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The Two
Principal Arguments
in the

TRIAL OF AARON BURR

by

William Wirt

Richmond, Va.
1808

IT is my duty to proceed on the part of the United States in opposing this motion. But I should not deem it my duty to proceed, if I thought the motion itself well founded. I stand here with the same independence of action which belongs to the Attorney of the United States, and as he would certainly relinquish the prosecution the moment he became convinced of its injustice, so also, most certainly would I:—The humanity and justice of this nation would revolt at the idea of a prosecution pushed on against a life which stood protected by the laws; but whether they would or not, before I would, plant a thorn in my own heart to rankle there for life, by opening my lips, unconscientiously in such a case, I would seal them up forever. Believing, however, as I do, that this motion is a mere manœuvre to obstruct the enquiry, to wrest the trial of the facts from the proper tribunal, the jury, and embarrass the court with a resposibility which it ought not to feel, I hold it my duty to proceed—for the sake of the court, for the sake of vindicating the trial by jury, now sought to be violated, for the sake of full and ample justice in this particular case, for the sake of the future peace, union and independence of these states, I hold it my bounden duty to proceed.

And while I do so, let me request the prisoner and his counsel to consider the difficulty of clothing my argument in terms which may be

congenial with their feelings. The gentlemen appear to me to feel a very extraordinary and unreasonable degree of sensibility on this occasion. They seem to forget the nature of the charge and that we are the prosecutors. We do not stand here to pronounce a panegyrick on the prisoner, but to urge home upon him the charge of treason against the United States.—*Treason* is the charge; when we speak of treason we must call it treason; when we speak of a traitor, we must call him a traitor; when we speak of a plot to dismember the union, to undermine the liberties of a great portion of the people of this country, and subject them to an usurper and a despot, we are obliged to use the terms which convey these ideas. Why, then, are gentlemen so sensitive? Why, on these occasions so necessary and so unavoidable, do they shrink back with as much agony of nerve as if, instead of a hall of justice, we were in a drawing room with Col. Burr, and were barbarously violating towards him, every principle of decorum and humanity.

We have, indeed, been invited by Mr. Wickham to conduct this argument on abstracted ground; and have been told that it is expected to be so conducted:—but, sir, if this were practicable, would there be no danger in it; would there be no danger while we were mooting points, pursuing ingenious hypotheses, chasing elementary principles over the wide-extended plains and Alpine heights of abstracted law, that we should lose sight of the great question

before the court. This may suit the purposes of the counsel for the prisoner; but it does not, therefore, necessarily suit the purposes of truth and justice. It will be proper when we have derived a principle from law or argument, that we should bring it to the case before the court in order to test its application and its practical truth: In doing which we are driven into the nature of the case and must speak of it as we find it. But, besides, the gentlemen have themselves rendered this totally abstracted argument impossible; for one of their positions is, that there is no overt act proven at all. Now, that an overt act consists of fact and intention has been so often repeated here, that it has a fair title to justice Vaughan's epithet of a *decantatum;* in speaking then of this overt act, we are compelled to enquire not merely into the fact of the assemblage, but the intention of it; in doing which we *must* examine and develope the whole project of the prisoner. It is obvious, therefore, that an *abstract* examination of *this point* cannot be made: and since the gentlemen drive us into the examination, they cannot complain, if, without any softening of lights or deepening of shades, we exhibit the picture in its true and natural state.

This motion, sir, is a bold and original stroke in the noble science of defence. It shews the hand and genius of a master. For while it gives to the prisoner the full benefit of his legal defence, of the whole and sole defence which he would be able to make to the jury, if the evi-

dence were gone through, it cuts off from the prosecution all that evidence which goes to connect the prisoner with the assemblage on the island, to explain the destination and objects of that assemblage, and to stamp, beyond controversy, the character of treason upon it. Connect this motion with that which was made by the prisoner the other day, to compel us to begin with proof of the overt act, in which from their zeal, gentlemen were equally sanguine, and observe what would have been the effect of success in both motions; we should have been reduced to the single fact, the insulated fact of the assemblage on the island, without any of that evidence which explains the intention and object of that assemblage; thus gentlemen would have cut off all the evidence which carries up this plot almost to its conception; which at all events, describes the first motion, which quickened it into life, and follows its progress until it attained such strength and maturity as to throw the whole western country into consternation: Of the *world* of evidence which we have, we should have been reduced to the speck, the atom which relates to Blennerhassett's island; General Eaton's published narrative, hitherto so much and so unjustly reviled, would have been without the strong corroboration of Commodore Truxton, and the still stronger and most extraordinary coincidence of the Morgans. Standing alone, gentlemen would have still proceeded to speak of that affidavit as they have heretofore done; not de-

claring that what General Eaton had sworn, was not the truth, but that it was a *most marvellous story! a most wonderful tale!* and thus would they have continued to seek in the bold and wild extravagance of the project itself, an argument against its existence, and a refuge from public indignation. But that refuge is taken away. General Eaton's narration stands confirmed beyond the possibility of rational doubt.—But I ask what inference is to be drawn from these repeated attempts to stifle the prosecution and smother the evidence. If the views of the prisoner were, as they have been so often represented by one of his counsel, *highly honorable to himself and glorious to his country*, why not permit the evidence to disclose these views? Accused as he is of high treason, he would certainly stand acquitted, not only in reason and justice, but by the maxims of the most squeamish modesty, in shewing us, by evidence all this honor and this glory which his scheme contained.—No, sir, it is no squeamish modesty; it is no fastidious delicacy that prompts these repeated efforts to keep back the evidence; it is apprehension; it is fear; or rather, it is the certainty that the evidence whenever it shall come forward will fix the charge; and if such shall appear to the court to be the motive of this motion, your honors, I well know, will not be disposed to sacrifice public justice committed to your charge, by aiding this stratagem to elude the sentence of the law; you will yield to the motion no farther than the rigour of legal rules shall imperiously constrain you.

I come now to answer the argument of the gentleman (Mr. Wickham) who spoke first in support of this motion. I will treat the gentleman with candour. I will not follow the example which he has set me on a very recent occasion. I will not complain of flowers and graces, where none exist. I will not, like him, in reply to an argument, as naked as a sleeping Venus, though certainly not half so beautiful, complain of the painful necessity I am under, in the weakness and decrepitude of logical vigor, of lifting first this flounce and then that furbelow before I can reach the wished-for point of attack. I keep no flounces or furbelows ready manufactured and hung up for use, in the millinary of my fancy—and if I did, I think I should not be so indiscreetly impatient to get rid of my wares as to put them off on improper occasions. I cannot promise to interest you by any classical and attic allusions to the pure pages of Tristram Shandy; I cannot give you a squib or a rocket in every period; for my own part I have always thought these flashes of wit, (if they deserve even that name;) I have always thought these meteors of the brain which spring up with such exuberant abundance in the speeches of that gentleman, which play on each side of the path of reason or sporting across it with fantastic motion, decoy the mind from the real point of enquiry, no better evidence of the soundness of the argument with which they are connected, nor give me leave to add, the vigor of the brain from which they spring, than those vapors which

start from our marshes and blaze with a momentary combustion, which, floating on the undulations of the atmosphere, beguile the traveller into bogs and brambles, are evidences of the firmness and solidity of the earth from which they proceed. I will endeavor to meet the gentleman's positions fully and to answer them fairly; I will not as I am advancing towards them, measure with my mind's eye, the height, breadth and power of the proposition; if I find it beyond my strength, halve it; if still beyond my strength quarter it; if still necessary, subdivide it into eighths; and when by this process I have reduced it to the proper standard, take one of these sections and toss it with an air of elephantine strength and superiority. If I find myself capable of conducting, by a fair course of reasoning, any one of his propositions to an absurd conclusion, I will not begin by stating that absurd conclusion as the proposition itself which I am going to encounter. In commenting on the gentleman's authorities, I will not with sarcastic politeness thank him for introducing them; declare that they conclude directly against him; read just so much of the authority as serves the purpose of that declaration, omitting that which contains the true point of the case which makes against me; nor if forced by a direct call to read that part also, will I content myself by running over it as rapidly and inarticulately as I can, throw down the book with a theatrical air, and exclaim, "just as I said," when I know it is just as I had not said.

I know that by adopting these arts I might raise a laugh at the gentleman's expense ; but I should be very little pleased with myself, if I could enjoy a laugh so raised. I know, too, that by adopting such arts, there will always be those standing around us, who have not comprehended the whole merits of the legal discussion, and with whom I might shake the character of the gentleman's science and judgment as a lawyer. I hope I shall never be capable of such a wish ; and I had hoped that the gentleman himself felt so strongly that high-aspiring and ennobling magnanimity which I had been told that conscious talents rarely fail to inspire, that he would have looked with disdain on the poor and fleeting triumph which could be gained by arts like these.

I proceed now, sirs, to answer his points so far as they could be collected from the general course of his speech. I say so far as they could be collected ; for the gentleman although requested before he began, refused to furnish us with his points in writing. It suited better his partizan style of warfare to be perfectly at large ; to change his ground as often as he pleased ; to day on the plains of Monmouth—to-morrow at the Eutau Springs. He will not censure me, therefore, if I have not been correct in gathering his points from a desultory discourse of four or five hours length. I trust, however, that I have been correct—it was my intention to be so—for I can see neither pleasure or interest in *misrepresenting* any gentleman ; and

I now beg the court or the gentleman, if he will vouchsafe it, to set me right if I have misconceived him.

I understand him then, sir, to resist the introduction of farther evidence under this indictment on these four grounds.

1. Because Aaron Burr, not being present on the island at the time of the assemblage, cannot be a principal in the treason within the constitutional definition; nor within the *laws* of England.

2. Because the fact must be proved as laid; and as the indictment charges the prisoner with levying war with an assemblage on the island, no evidence, to charge him with that act by relation is relevant to this indictment.

3. Because if he be a principal in the treason at all, he is a principal in the second degree; and his guilt being of that kind which is termed derivative, no parol evidence can be let in to charge him until we shall shew a record of the conviction of the principals in the first degree.

4. Because no evidence is relevant, to connect the prisoner with others and thus to make him a traitor by relation, until we shall previously shew an act of treason in those others; and the assemblage on the island was not an act of treason.

Let us examine the first ground:—it is because Aaron Burr, not being present on the island at the time of the assemblage cannot be a principal in the treason within the constitutional definition nor within the laws of England.

In many of the general reflections expressed by the gentleman under this head I perfectly accord with him; as that the constitution intended to guard against arbitrary and constructive treasons; that the principles of sound reason and liberty require their exclusion. I have no objection either to his position that the constitution is to be interpreted by the rules of reason and of moral right. I fear, however, that I shall find it difficult to accommodate both the gentlemen who have spoken in support of the motion; for while Mr. Wickham demands reason for the guide of our interpretation, Mr Randolph exclaims "save us from the deductions of common sense." A kind of reason which is not common sense, would, indeed, be adapted to the joint purposes of both the gentlemen; but as that is a species of reason of which I have no very distinct conception, I hope the gentleman will excuse me for not employing it. Let us return to Mr. Wickham. Having read to us the constitutional definition of treason and given us the rule by which it was to be interpreted, it was natural to expect that he would have proceeded directly to apply that rule to the definition and give us the result. But while we were expecting this—even while we have our eyes upon the gentleman, he vanishes like a spirit from American ground and we see him no more, until re-surging in England, by a kind of intellectual magic, we find him in the middle of the 16th century, complaining most dolefully of the state of my Lord Coke's bowels. Be-

fore we follow him in this excursion let us enquire what it was that made the gentleman start with such terror from the regular track of his argument. It was, sir, the decision of the supreme court in the case of Bollman and Swartwout; it was that judicial exposition of the constitution by the highest court of the nation, upon the very point which the gentleman was considering. Sir, if the gentleman had believed this decision favorable to him, we should have heard of it in the beginning of his argument, for the path of enquiry in which he was, led him directly to it. Interpreting the American constitution he would have preferred no authority to that of the supreme court of the country. Yes, sir, he would have immediately seized this decision with avidity: he would have set it before you in every possible light: he would have illustrated it; he would have adorned it; he would have expanded it; you would have seen it, under the action of his genius, loom with all the varying grandeur of our mountains in the morning's sun. He would not have relinquished this decision, for the common law; he would not have deserted a rock so broad and so solid, to walk upon the waves of the Atlantic. But he knew, sir, that this decision was against him: he felt, too, that it closed against him completely the very point which he was labouring. Hence it was, that the decision was kept so sedulously out of view, until, from the exploded materials of the common law, he thought he had reared a Gothic edifice

so huge and so dark as quite to overshadow and eclipse it. Let *us* bring it from this obscurity into the face of day. We who are seeking truth and not victory, whether right or wrong, have no reason to turn our eyes from any source of light which presents itself; and least of all from a source so high and so respectable as the decision of the supreme court of the United States. Let it be remembered that the enquiry is whether *presence* at the overt act is necessary to make a man a traitor: *it is necessary* say the gentlemen; what says the supreme court? "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country: on the contrary if war be actually levied, that is, if a body of men be assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or *however remote from the scene of action*, and who are actually leagued in the general conspiracy, are to be considered as traitors".* Here then we find the court so far from requiring presence, that they expressly declare that *however remote* the accused may have been from the scene of the treasonable assemblage, he is still involved in the guilt of that assemblage; that he was *leagued in the general conspiracy* which produced it, is sufficient to make the overt act his own. The supreme court being

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* *Decision of the Supreme Court, in case of Bollman and Swartwout.*

of that opinion, proceeded to an elaborate examination of the evidence to ascertain whether there had been a treasonable assemblage. They look to the depositions of General Eaton and General Wilkinson, to the cyphered letter, to the declaration of Swarwout that Burr was levying an armed body of seven thousand men; and they look to these parts of the evidence expressly for the purpose of discovering whether it was probable that *Burr* had actually brought those men together: not whether Bollman and Swarwout were present at any such assemblage; they knew that if any such assemblage had taken place, Bollman and Swartwout must have been, at that time, at the City of Orleans, or on their way thither: indeed, the whole reasoning of the court proceeded on the fact, as admitted, of the prisoner's absence. Why then, the laborious investigation which the court make as to the probability of *Burr's* having brought his men or any part of them together, unless the guilt of that assemblage was to be imputed to Bollman and Swartwout? If their absence had been sufficient to excuse them, that fact was admitted, and the enquiry would have been a very short one. But the court having previously decided that the fact of presence or absence was unimportant, that it made no odds how far distant the accused might be from the treasonable assemblage, it became the unavoidable duty of the court to proceed to the enquiry whether any such assemblage had taken place; and if the evidence had manifested that fact to

their satisfaction, it is clear that in the opinion of that court the prisonsers would have been as deeply involved in the guilt of that assemblage as any of those who actually composed it.

The counsel knew that their first point was met directly by the counter authority of the supreme court; they have impliedly if not expressly admitted it; hence they have been reduced to the necessity of taking the bold and difficult ground that the passage which I have read is extrajudicial—a mere *obiter dictum*.—They have *said* this; but they have not attempted to *shew* it. Give me leave to shew that it is not an *obiter dictum:* that it is not *extrajudicial;* but that it is a direct adjudication of a point immediately before them. The court made no formal division of the subject. It divided itself. The arrest of Bollman and Swartwout at New-Orleans, and the fact that they had not been present at any assemblage of the traitors in arms, were notorious and admitted. The case necessarily presented to the court three distinct questions: 1. Are these men leagued in any treasonable conspiracy? 2. Is the fact of their being leagued with it, sufficient, of itself, to implicate them in the guilt of any overt act of that treason? or is it necessary that they should actually have borne a part in that overt act? 3. Has there been an overt act?—Now if the court had been satisfied that there had been an overt act, and that these men were leagued in the conspiracy which produced it, still it would have remained a distinct and substantive ques-

tion whether their absence from the overt act and their having no immediate hand in it, did not discharge them from the constitutional guilt of levying war; for although leagued in the conspiracy, and although there might have been an overt act, these men would have been innocent, if presence at the overt act was necessary to make them guilty. The question then of presence or absence, was a question really presented by the case of Bollman and Swartwout: it was one important to the decision of that case; and the court thinking it so did consider and decide it in direct opposition to the principle contended for on the other side.

Here, sir, having the authority of the supreme court on my side, I might safely dismiss the gentleman's first point. But Mr. Randolph seems to think it doubtful whether you ought to be bound by that authority; even admitting it to be a regular judicial determination of this question; for he made a very pathetic and affecting apostrophe to the situation in which you would be placed, if you differed from this opinion of the supreme court. I can discern nothing very tragical in your situation:—a principle of law, solemnly adjudged by the supreme court, becomes, I apprehend, the law of the land: all the inferior courts of the United States, are bound by it. To say that they are not bound by it, is to disorganize the whole judiciary system, to confound the distinctions and grades of the courts, to banish all certainty and stability from the law, and to destroy all uniformity of decisi-

on. If you, sirs, sitting as a circuit court are not bound by the adjudications of the supreme court in this case, neither would any other circuit court in the union be bound by it: and the result might be and certainly would be that what would be treason in one circuit would not be treason in another: and a man might be hung in Pennsylvania for an act against the United States, in which he would be held perfectly innocent in Virginia: thus treason against the United States, would still be unsettled and fluctuating, and the object of the constitution in defining it would be disappointed and defeated. I trust that we are not prepared to rush into this wild disorder and confusion; but that we shall temparately and regularly conform to the decrees of that parent court, of which this is a mere branch, until those decrees shall be changed by the same high authority which created them.

But instead of reposing on the authority of that decision, let us go further, and let us indulge the gentlemen with the enquiry whether that decision is in conformity with the constitution of the United States and the laws of England.

In interpreting the constitution let us apply to it the gentlemen's own principles: the rules of reason and of moral right.

That a law should be so construed as to advance the remedy and repress the mischief is not more a rule of common law than a principle of reason: and in reason, it applies to penal

as well as remedial laws: so also, the common law maxim that a law, as well as a covenant, should be so construed as that its object may rather prevail than perish, is one of the plainest dictates of common sense. Apply these principles to the constitution. Gentlemen have said that its object was to prevent the people from being harrassed by arbitrary and constructive treason. But its object, I presume, was not to declare that there was no such crime. It certainly did not mean to encourage treason. It meant to recognize the existence of the crime and to provide for its punishment. The same liberties of the people which required that the offence should be defined, circumscribed and limited, required also that it should be certainly and deeply punished: and the framers of the constitution, informed by the examples of Greece and Rome, and foreseeing that the liberties of this republic, might, one day or other, be seized by the daring ambition of some domestic usurper, have given peculiar importance and solemnity to the crime by engrafting it upon the constitution. But they have done this in vain, if the construction contended for on the other side is to prevail. If it requires actual presence at the scene of the assemblage to involve a man in the guilt of treason, how easy will it be for the principal traitor to avoid this guilt and escape punishment forever? He may secretly wander like a demon of darkness from one end of the continent to the other; he

may pour poison into the simple and unsuspecting minds of his countrymen; he may seduce them into a love of his person; may connect them in his plots; attach them to his glory; he may prepare the whole mechanism of the stupendous and destructive engine and put it in motion; let the rest be done by his agents; let him keep himself only from the scene of the assemblage or the immediate spot of battle, and he is innocent in law, while those whom he has deluded are to suffer the death of traitors. Is this reason? Is this moral right? Is this a mean of preventing treason? Or is it not rather, in truth, a direct invitation to it? Sir, it is obvious, that neither reason nor moral right require actual presence at the overt act to constitute the guilt of treason: nor can a sound mind or a sound heart doubt one moment, between the comparative guilt of Aaron Burr (the prime mover of the whole mischief) and of the poor men on Blennerhassett's island, who called themselves Burr's men. There is a moral sense much more unerring on questions of this sort, than the frigid deductions of jurists or philosophers. The decision of the supreme court, sir, is so far from being impeachable on the ground of reason and of moral right, that it stands supported by their most obvious and palpable dictates. Give to the constitution the construction contended for on the other side and you might as well expunge the crime from your criminal code: nay, you had better do it; for by this construction you hold out to ambition and

talents, the lure of impunity; while you loose the vengeance of the law on the comparatively innocent.

Sir, the decision of the supreme court is equally supported by the law of England. Lord Coke, commenting on those words of the statute of Edward, which make our constitutional definition of treason, says, " if *many* conspire to levy war, and *some* of them do levy, the same according to the conspiracy, this is high treason *in all*, for in treason all are principals and war is levied." 3 Inst. 9. In page 16, he says, that although the statute of Mary which first made counterfeiting the privy signet or sign manuel, high treason, says nothing of aiders or consenters, " yet they are within the purview of this statute, *for there be no accessories in high treason.*" So also in page 21, he says, " In high treason there is no accessories but all be principals: and therefore, whatever act or consent will make a man accessory to a felony before the act done, will make him a principal in high treason." In page 138, he says, " it is a sure rule in law that *in alta proditione nullus potest esse accessorius, sed principalis solum modo;*" and in illustration of the rule he puts this case, " if any man commit high treason and thereby " becometh a traitor, if any other man know- " ing him to be a traitor, doth receive, comfort " and aid him, he is guilty of treason, for that " there be no accessory in high treason." The gentlemen, indeed, admit that according to Coke's authority, their client although absent

might be a principal in the act of treason. But Coke, they say, had no bowels; he was hard hearted and cruel; his thirst for blood was so great that it misled his understanding. Coke, however, does not state the positions which I have read, on his own authority: on the contrary he cites in the margin the authorities on which he bottoms them, and most ancient and respectable authorities they are. But to gratify the gentlemen let us put Coke aside: What will they say to Lord Hale? Did any fierce and savage passions agitate his breast or darken the horizon of his understanding? O! no, sir; no spot ever soiled the holy ermine of his office; mild, patient, benevolent; halcyon peace in his breast, with a mind beaming the effulgence of noon-day, and with a seraph's soul, he sat upon the bench—like a descended God! Yet this judge has laid down the doctrine for which I contend, in terms as distinct and emphatic as those of Lord Coke.—Here Mr. Wirt read 1 Hale's Hist. Pleas of the Crown, 214, 339, 323, 328, 613—Hawkins and Foster support the same doctrine, 1 Hawk. ch. 17, sec. 39, 2 Hawk. ch. 29. sec. 2. Foster 341.

I admit that judge Tucker has combated the doctrine that in treason all are principals.—I admit the truth of all the encomiums which the counsel for the defendant have pronounced on that gentleman. He has all the illumination of mind and all the virtues of the heart, which they, with the view of enhancing the weight of his authority, have been pleased to ascribe to

him. What they have said of him, from policy, I can say of him, from my heart, for I know it to be true. Yet give me leave, sir, to examine very briefly, his argument upon this subject. His object is to prove that the position " in high treason all are principals" is not law in England. The mode which he adopts to prove his point is this: he collates all the authorities which have supported this doctrine, and tracing it up, with patient and laborious perseverance, with the view, *petere fontes*, he finds the first spring in the reign of Henry the 6th.—That case is reported in the year book 1. Henry 6, 5, and is very nearly as stated by Mr. Tucker from Stanford. It is simply the case of a man who broke a prison and let out traitors.—Stanford says it was adjudged petit treason; the year book merely says that he was drawn and hanged, a sentence which in those days when the notions and punishment of treason, (notwithstanding the statute of Edwd.) remained still unsettled, is certainly no very unequivocal proof that his crime was petty treason. Mr. Tucker thinks this case not correctly reported, and that the grounds of the judgment seem not well understood. It is to be recollected, however, that these year books, as we are told by Blackstone, serve as indices to the records in the several offices in Westminster; Coke, then, Hale, Hawkins, Foster, and all those authors who have relied on this case as establishing the doctrine in question, guided by the marginal reference in the year book, had it in

their power to examine the whole original record in the case, and thereby to understand the entire grounds on which that case proceeded.—From their great industry and their prodigious research, there can be no doubt that they did so, and that they have therefore stated the principles of this case correctly. Chief justice Hussey in the 3 Henry the 7th, 10, about sixty years after the first decision, and consequently with much better means of understanding its nature, extent and boundaries than we can possess, refers to it as asserting the doctrine that in treason there are no accessaries, but all are principals. Nor is it to be believed that this doctrine originated in the reign of Henry the 6th. The earliest reported case indeed which has come down to us occurred in the first year of that reign.—There is nothing, however, in the manner of the report which marks it as a case of the first impression; on the contrary the sentence seems to have been a thing of course, and the judges of that day appear, in the language of Blackstone, to be merely pronouncing the immemorial custom of the land. The learned and laborious Hawkins speaking no doubt, after the most profound and extensive research, declares in a passage before cited, that it seems to have been *never doubted* that in treason all are principals. And most certainly, from a very early period in the fifteenth century to the present day, that doctrine has not been questioned in England.—After such a lapse of years and centuries, after such full and perfect consent and concurrence

among all the judges and all the writers of England, it would be bold in us to say, that this is not the law of England; and after all, the learned judge Tucker rests the fabric of his reasoning on the ground of the imperfection of the first report; an obstacle which, however insuperable to him, was easily to be surmounted by those great men who had access to the original record; and who having that access have affirmed that the case justified the doctrine which they advance. Let me conclude my remarks on Judge Tucker by observing that however deeply and sincerely I revere him, yet certainly when the question is "what is the law of England," it cannot be considered as disrespectful to our learned and virtuous countryman to prefer the authority of such men as Coke, Hale, Hawkins and Foster, to his. It is on the authority of those distinguished men I shall rest my conclusion that the opinion of the supreme court of the United States is in harmony with the English law.

But we are told by Mr. Wickham that all this is elementary and theoretic: that there are no practical decisions worthy of respect which maintain the principle. Suppose this were so, would any judge require higher authority for the law of England than such names as those which I have just mentioned; would a case from the year books decided by Hussey or Rian or a case from the State Trials decided by Brumley, Jeffries, or even Holt himself be higher authority than Coke and Hale, Hawkins

and Foster? Certainly not. The three cases, however, from the year books, in the reigns of Henry the 6th and 7th, on which Judge Tucker comments, are adjudged cases which avow the principle. In addition to these, Coke in the margin of the passages before read, cites several cases in the reign of Edward the 3d, which I have not had time to examine, but which it is presumable from his learning and accuracy, are properly cited in support of his doctrine.

Mr. Wickham says that the books shew only two cases of accessaries before the fact having been adjudged guilty as principals: but he admits that there are several cases of accessaries after the fact being so adjudged; and he seems to be apprehensive that we shall reason from these latter cases to the case of an accessary before the fact. I do not know that it is important, but the truth is that the gentleman, unintentionally, no doubt, has inverted the order of guilt in this case; *in reason*, the accessary before the fact, he who procures the act or assists in bringing it about, is certainly much more guilty than the accessary after the fact, who having no previous knowlege of the fact, much less any agency or instrumentality in bringing it about, merely receives and comforts the man who has done it. This line of discrimination so strongly drawn by *reason* was long respected by *the law* of England, and so far were accessaries after the fact from occupying the worst ground, that while it was *never* doubted that accessaries before the fact were guilty as principals, it was

very long doubted whether accessaries after the fact were so guilty. This we are expressly told by Hawkins:—2 Hawk. ch. 29, sec. 3. I think, however, I shall shew by and bye that these accessorial doctrines have nothing to do with the case at bar.

The gentleman next read the case of Sir Nicholas Throckmorton's sufferings as they are collected into a Gorgon's head by Judge Tucker. We do not rely upon the authority of that case; and the gentleman by reading it has proved only what we readily admit, that Brumley was a judicial tyrant, and that Throckmorton was cruelly and barbarously oppressed. I can see but two motives which the gentleman could have had in view in reading this case with a countenance and cadence of such peculiar pathos: the first contains an implication not very respectful to the court: that it was necessary to hold up to this court, *in terrorem*, the immortal infamy of Brumley's name: the second to excite our sympathies, under the hope that when once set afloat, for the want of some other living object they might attach themselves to his client. It was with the same views, I presume, that the gentleman gave us the pathetic and affecting story of the Lady Lyle as it is touched by the chaste and delicate pencil of Hume. It was with the same views, also, that he recited from the same author the deep, perfidious and bloody horrors of a Kirk and a Jeffries.—Sensible that there was nothing in this trial or

in the virtues of his client to interest us, he borrowed the sufferings and the virtues of a Throckmorton, and a Lady Lyle, to set our hearts a bleeding; thinking that our pity thus excited, would be graciously transferred, assigned and set over, by way of indorsement, to his client. I congratulate the gentleman upon the ingenuity of the device: the only defect in it is the great hazard, that while we are running parallels between his client and the *dramatis personæ* introduced from Hume, we shall find among them an apter prototype for him than in the virtuous and manly Thockmorton, or the simple, innocent and humane Lady Lyle.

But we are told that, however, the case may have been *prior* to the revolution of 1688, *since that period* they have leaned the other way, and go to shew that accessorial acts will not make a principal in treason. How is this conclusion obtained: by any adjudged case? no: by any *obiter dictum* of a judge? no. How then does the gentleman support the idea of this change in the English law? He infers it from the impunity of many of those who fought the Pretender's battles or aided him in his flight. This is a new way of settling legal principles. Sir, this was the mere policy of the house of Hanover. The pretensions of the Stuarts had divided the British nation. Their adherents were many and zealous. Their pretensions were crushed in battle. Two courses were, then, open to the reigning monarch: either by

clemency and forbearance to assuage the animosity of his enemies, and prop and brace his throne with the affections of his people; or to pursue his enemies with vengeance; to drive them to desperation; to disgust his friends by needless and wanton cruelty; and to unsettle and float his throne in the blood of his subjects. He chose the former course; and from this politic or magnanimous forbearance it is argued that the law of treason was changed. To prevent this inference, according to the reasoning of the gentleman, it was necessary to have beheaded or hung up every human being who even aided the unfortunate Charles in his flight. Mr. Wickham has mentioned Miss Mc Donald and he would have had the monarch to have hazarded the indignation and revolt of a generous people by siezing that beautiful and romantic enthusiast, Flora Mc Donald, and dragging her from her native mountains in the isle of Sky to a prison and to death. We are told, indeed, by Doctor Johnson in his tour to the Hebrides, that this step, impolitic as it was, nevertheless was hazarded; hazarded but partially though; she was carried to London; but together with Mc Cleod who had aided in the same flight, she was dismissed, on the pretext of the want of evidence. But certainly a forbearance to punish under an existing law, is no argument of the change of that law.

The gentleman unable to sustain either by *adjudication or dictum* this novel idea that the law of treason is changed since the revolution of

1688, proceeds still farther in the attempt to support it by inference and next infers from the special form of the indictment in Foster 3—6, that presence at the overt act is indispensible to the treason of levying war. That indictment lays two overt acts of the treason; first the general overt act of assembling with an armed multitude and levying war; secondly the entering and taking the town and castle of Carlisle, from the special nature of which last over act the gentleman deduces the conclusion, that the first was not sufficient; and that the last must necessarily have been proven to sustain the indictment; but is it any where decided that this second overt act was necessary? On the contrary in Lord Balmerino's case (10th St. Trials, 605.) also cited by Mr. Wickham, where the indictment was precisely that in Foster, it is argued by the counsel for the Crown and admitted by the court, in effect, that the proof of the second overt act was unnecessary; that it was immaterial whether the evidence shewed him to have entered and taken the town of Carlisle or not; that it would be sufficient to introduce evidence to the first overt act; the general overt act of levying war. Hence it is obvious that the specification of entering and taking the town of Carlisle was unnecessary and superfluous; and therefore no inference can be fairly drawn from the insertion of it in the indictment.—But it is strange that the gentleman should attempt to draw from the mere form of this indictment in Foster the conclusion that the law

of England was changed, and that an accessorial act would no longer make a principal in treason, when Foster himself expressly lays down the reverse of this principle, in the passage which I have before cited, and declares that *all* who are leagued in the conspiracy to levy war, are guilty of the levying whether present or absent—whether the war was levied by *a few* or *by all*. The same remark applies equally to the inference attempted to be drawn by Mr. Wickham from the case of Deacon and Wedderburne, reported by the same author.

Other remarks of the gentleman under this head as to accessories being the mere creatures of the common law, and the common law not existing in this country, will be more properly noticed under another head.

I hope it may now be justly considered as proven that whether we look to the laws of England, or to the Constitution of the United States, as expounded by the rules of reason and of moral right, or as expounded by the supreme court of the United States, the prisoner's presence on Blennerhassett's island at the time of the overt act was not necessary to the constitution of his guilt; and therefore that there is nothing in the gentleman's first objection to prohibit the introduction of farther proof.

But if, after all, this court should be of opinion that the prisoner's presence on the island was necessary to make this an overt act of war, is not this a question for the jury? The question whether there has been an overt act of war

or not is a mixed question of fact and law: it is the question made by the issue in this case; it is the very question which the jury are sworn to decide. If, for this objection that presence is a material ingredient in the composition of the act, the court exclude all farther evidence, will this not amount to saying that we have not proved the overt act to the satisfaction of *the court;* that the evidence we have introduced and all we propose to introduce will be insufficient to satisfy *the court* of the overt act? And will not *the court*, hereby, take the place of the jury; forestall them in the very question which they are sworn to try, and snatch it from them by a *coupe de main?* Gentlemen, indeed, try to give this question a legal attitude by contending that other evidence will be irrelevant until the fact of presence shall be proven; but, then, in order to decide this question in the affirmative, the court must assume the function of a jury and say that the overt act is not and will not be sufficiently proven without it. But suppose this question as to the necessity of presence, a question of pure law; still it would be a question which the jury would have a right to decide; since the law as well as the fact is completely within their power. The court may, indeed, after all the evidence shall be given, instruct the jury as to the law; they may instruct them as to what will constitute an overt act of levying war. But nothing more clearly shews the sovereign power and controul of the jury both over the law and fact than this; that, even,

after such instruction of the court, the jury may if they choose decide the case in opposition to such instruction. I do not say that they will do it; or that they ought to do it; but I say that they may do it if their conscience shall so direct: and I say this by the way of shewing the paramount power of the jury, over the very question now sought to be withdrawn from them and given to the court. I conclude this point with assuming it as proven that actual presence was not necessary to make the prisoner a principal in the treason; and if the court shall think it was, that this is a question which cannot be taken from the jury.

This objection therefore furnishes no legal bar to the introduction of our evidence.

I proceed to examine the gentleman's second point. It is this; no farther evidence is admissible under this indictment, because the fact must be proved as laid; and as the indictment charges the prisoner with levying war on the island where it is proven he was not, there is an end of the case; no farther evidence can be let in under this indictment.

Under this head the gentleman began by commenting on the omission of the word *public* in the indictment; " why did not the Attorney for the United States, charge the prisoner with levying *public war*, instead of merely charging him with levying war; why was the word *public* left out?" and then with a countenance insinuating even more than his expression, he asked, " whether the word *public* was omitted to ren-

der the indictment more palatable to the Grand Jury ?"

The answer is a very simple one ; the indictment was drawn from an authentic copy of the indictment in the case of Fries ; it is an exact transcript of that indictment *mutatis mutandis*. There the word *public* is not found.

Nor is it necessary that it should there be found. The indictment pursues the constitution and act of Congress and transfers from those instruments *verbatim* the definition of treason.—The constitution does not say that treason shall consist in levying *public* war against the United States ; but simply in levying war against them. So also is the act of Congress. An indictment pursuing that definition in express terms is certainly sufficient to all intents and purposes. The word *public* is surely of no importance. The gentleman, indeed, on the second day of his argument admitted that it was of no importance ; and acknowledged his error in saying, that this was the first indictment which had omitted it. He acknowlged that in the second indictment of Fries it was omitted. It was natural to have expected that the gentleman, on this discovery, would have retracted the ungenerous insinuation that the word had been intentionally omitted in order to render the indictment more palatable to the Grand Jury. He thought proper, however, to let the insinuation remain where it was. Be it so. The Attorney has the consolation to know that his purity is to be estimated by his country, and not by the prisoner or his counsel.

But it seems that the indictment charges the act to have been done with divers persons unknown; and we attempt to prove that it was done with persons who were known. This is an objection which I had supposed the manliness of the gentleman's understanding would have rejected. He thought proper, however, in the dearth of other materials to urge it with his wonted spirit and to attempt to support it by authorities. He does not pretend, indeed, that any author elementary or practical, has ever asserted that this is *necessary*. He does not pretend that any judge has ever declared it so. But he infers it from the specification of other names in several indictments during the protectorship of Oliver Cromwell. He cites the cases of Hewitt and Mordaunt. I have examined those cases. They are not indictments for levying war; they charge the prisoners with delivering military commissions to several persons, who are named, in behalf of Charles the II. Their offence, from the nature of it, required the naming of Charles the II. and those to whom commissions were delivered. But in the treason of levying war the most usual form is to charge the war to have been levied with persons unknown, and that in cases where the persons certainly were known. Thus Lord Balmerino and the Earls of Kilmarnock and Cromartie were in arms together on the field of Culloden. They were taken prisoners together, they were severally indicted on the same

day for the same offence; arraigned on the same day; and although, therefore, it is clear that they were all known to the Attorney for the Crown, yet each indictment charges each prisoner to have levied war with persons unknown. The gentleman says it is not enough to charge the prisoner with levying war; but that in the overt act we should have set out the particular acts which were done by the prisoner, and the evidence by which we mean to charge him. I deny, sir, that this is law. It is a question strictly legal, and therefore is to be decided by authority. East, 1 vol. page 116, after stating that in every indictment for high treason, the particular species of treason must be charged *in the very terms* of the statute of Edward as the substantial offence, adds that "then some overt act must be laid as the means made use of to effectuate the traitorous purpose." He proceeds, "The overt acts so laid are, in truth, the charge to which the prisoner must apply his defence. And therefore it is in no case sufficient to alledge that the prisoner compassed the king's death, or that he levied war against him, or adhered to his enemies; for upon a charge so general and indefinite he cannot know what he is to defend. The particular acts of the compassing and adherence mut be set forth: and in the other instance" (that of levying war) "it must be alledged *that he assembled with a multitude armed and arrayed in a warlike manner and levied war;*" and thus in our indictment it is alledged. East proceeds, "The indictments

against Damaree and Purchase for pulling down meeting houses, charged that they with a multitude to the number of 500, to the jury unknown, armed and arrayed in a warlike manner with clubs and staves, and other arms offensive and defensive, levied war against the queen. No exception was taken to the indictment by Damaree's counsel; but on behalf of Purchase it was objected that there ought to have been an overt act laid of the treason; because there being such a variety of facts which amount to levying war, if the particular facts intended to be brought forward against the prisoner were not alledged, he could not know how to make his defence. *But it was resolved by all the judges upon conference that the indictment was good; and that levying war being an overt act of itself no other overt act need be alledged.*" The indictments in those cases are substantially stated by Foster 213-14 and the indictments themselves will be found in 8 State Trials, 213-19. Now in those cases the acts which these men did and which constituted their crime, was pulling down meeting houses; but in the indictment there is not a word of meeting houses or any other houses; the overt act is, that with a multitude armed and arrayed in a warlike manner, they levied war against the queen: and the court upon solemn argument, and after a conference, decide unanimously that the indictment is sufficient, and let in the particular evidence under it. And as to the overt act's stating *the evidence* on which we mean to rely, it is express-

ly declared by East 121, on the authority of a variety of cases which he cites, that " it is not necessary that the whole detail of the evidence should be set out." In direct confirmation of this doctrine are Foster 194, 220. 1. H. H. P. C. 122. 4. St. Trials 722, Lowick's case, and 4 St. Trials, 696-7, Rookwood's case.

Mr. Wickman does not say that this minute specification on which he insists has ever been adjudged necessary, but he infers it from the form of the indictments in several cases which he has cited. They do not support him. In the cases of Balmerino, Cromartie and Kilmarnock, it is true, as I have before stated, that those indictments lay as one overt act the entering and taking possession of the town and castle of Carlisle; but in the first named case this specification is declared to be unnecessary, and it is said that the general overt act of levying war with an armed multitude would be sufficient to let in the evidence. These cases, therefore, instead of supporting Mr. Wickham, disprove the doctrine for which he contends. He still insists, however, that wherever it was intended to criminate a man by accessorial acts, the particular acts which he does, must be set out; and to prove this he again cites the indictments in the cases of Hewitt and Mordaunt, before mentioned, and of Cornish. I answer first, that no legal principle can be safely inferred from the mere forms of the indictments in the State Trials. They have been continually shifting and changing. Thus the case cited by Mr.

Randolph from the first State Trials, exhibits an indictment which is really a legal curiosity: the treason there charged is compassing the King's death, and the indictment is as much in detail as Pope's history of the parish clerk. But the inference that this detail is necessary is refuted by express authority; 1 East, 124-5, on various authorities informs us that it is sufficient in that species of treason (compassing the King's death) to lay as the overt act that A. and B. met and proposed the King's death. Besides, what becomes of this inference from an indictment so much in detail (at a period, when, as Mr. Randolph, says not a ray of judicial light had touched the English horizon) when in modern times of greater light, the indictments exhibit nothing of this detail. An inference from these modern indictments, that this detail is not necessary, is certainly as fair as the inference from the ancient indictments that it is necessary. Thus your inferences are in conflict and destroy each other. I refer you to the cases of Lowick and Rookwood, first cited for another purpose, to shew that this minute and circumstantial form of indictment is exploded. I refer you also to the Apprentices' case, 2 St. Trials, 581, to shew that under the general indictment for levying war, they go, in England, into the circumstances of the case at large. And secondly, I answer to Mr. Wickham's cases, that neither of them is for levying war. Hewitt and Mordaunt were indicted for giving commissions to officers of the exiled king; and this is not charged as

accessorial to any greater act, as levying war. The indictments are restricted to the single fact which I have stated, and contemplate no ulterior act. How then can it be said that those acts are of an accessorial nature, when the sole guilt in the case is consummated by the acts themselves, which are charged, without borrowing any portion of that guilt from any subsequent occurrence? The other case, that of Cornish, charges him with promising assistance to the Duke of Monmouth; and here his indictment stops: it does not look to any thing else (as Monmouth's invasion) to complete the prisoner's guilt. His guilt is the promise: not the levying of war. There is nothing therefore in these cases to warrant the principle, that when a man is attempted to be implicated by accessorial acts in the treason of levying war, those accessorial acts must be detailed. There is nothing in them to prove that the charge of levying war with an armed multitude is insufficient; on the contrary in the only case in which this point came directly in question before the court, it was unanimously and solemnly declared to be sufficient.

Is it not sufficient in reason as well as in law? Is it to be believed that Aaron Burr is not sufficiently apprized by this indictment of the charge against him to prepare for his defence? Has he not prepared, sir? Look at the fact. He himself states that he has summoned twenty or thirty witnesses.

Let us not then, sir, by these captious ex-

ceptions, unsupported either by law or reason, permit ourselves to be turned aside from the enquiry before us. Reason and law concur in shewing that there is nothing in Mr. Wickham's second point to obstruct the evidence.

I proceed, Sirs, to the gentleman's third point, in which he says he cannot possibly fail: it is this: "because if the prisoner be a principal in the treason at all, he is a principal in the second degree, and his guilt being of that kind which is termed derivative, no farther *parol* evidence can be let in to charge him until we shew a record of the conviction of the principals in the first degree." By this position the gentleman is understood to advance in other terms the common law doctrine, that when a man is rendered a principal in treason by acts which would make him an accessary in felony, he cannot be tried before the principal in the first degree. I believe this to be, indeed, the doctrine of the common law. But it has no manner of application to this case;

1st. Because it is the mere creature of the common law of England.

2ndly. Because if the common law of England be our law, this position assumes what is denied, that the conduct of the prisoner in this case is of an accessorial nature.

1. Because this position is the mere creature of the common law. Neither our constitution nor act of congress distinguish between principals in the first and second degree; all who levy war against the United States, whether present

or absent, all who are leagued in the conspiracy, whether on the spot of the assemblage, or performing some minute and inconsiderable part in it, a thousand miles from the scene of action, incur equally the sentence of the law: they are all equally traitors. This scale, therefore, which graduates the guilt of the offenders and establishes the order of their respective trials, if it ever existed here, is completely abrogated by the highest authorities in this country: The convention which formed the constitution and defined treason; congress which legislated upon that definition, and the supreme judiciary of the country, expounding the constitution and the law have united in its abrogation. But let us for a moment put the convention, congress and judiciary aside, and examine how the case will stand: still this scale of moral guilt which Mr. Wickham has given us, is *the creature of the common law;* but he himself in another branch of his argument has emphatically told us that the common law does not exist in this country; has stated that the creature presupposes the creator; and that where the creator does not exist, the creature cannot. The common law, then, being the creator of the rule which Mr. Wickham has given us, and that common law not existing in this country, neither can the rule which is the mere creature of it, exist in this country. So that the gentleman has himself furnished the argument which refutes this infallible point of his, on which he has so much relied. But to try his position to its utmost ex-

tent, let us not only put aside the constitution, act of Congress, and decision of the supreme court, but let us admit that the common law does exist here; still, before the principle could apply, it would remain to be proven that the conduct of the prisoner in this case has been accessorial:—or in other words, to give it its broadest footing, that his acts in relation to this treason are of such a nature as would make him an accessory in felony.

Being now on the general doctrine of principal and accessory, as they exist at common law, I will follow the gentleman through the whole range of his remarks on the subject, and notice some which he advanced under his first head.—He said that accessories are the mere creatures of the common law: hence, said he, when a statute is made in affirmance of common law or in aid of it, all common law consequences follow; as when a statute is merely declaratory of a common law felony, whether the statute says any thing about accessories or not, they are embraced by it, because they existed in the offence at common law: but where the statute creates a new felony, not known at common law, as the statute of Henry 8, making piracy a felony, accessories are not comprehended by it. Upon this ground-work he has built the argument that as *we* have no common law, the constitution and act of Congress which define treason, stand alone; and as they merely embrace those who actually levy war and are there-

fore the principals, those who procure or are otherwise accessory to it, are not comprehended: and hence he concludes that the prisoner who merely brought about this treason by procurement, is not within the constitution and act of Congress. This argument is perfectly characteristic of the ingenuity and subtlety of the mind which produced it; but let us try the strength of this curiously woven web. The first remarkable feature about it is, that the whole of it is an emanation of that common law, upon whose non-existence in this country the gentleman founds his conclusion. His premises are laid in the common law; and he derives from the common law rule of interpreting the British statutes, a principle which he applies analogically to the interpretation of our constitution; and which gives him his result, *only* upon the *postulatum* that there is no common law in the United States. But let us wave this objection and examine his premises themselves.

First, is it true that a statute made in affirmance of common law or in aid of it, carries along all common law consequences? The book referred to by the gentleman, does not prove it: 10th St. Tr. 436, which he cited as authority without producing it, is merely the argument of Hume Campbell one of the counsel in the cause, and against whom that cause was determined: I believe, sir, it is not usual for a gentleman citing an absent author in support of his doctrine to refer to the argument of counsel as the opinion of the court. But admitting that

the *dictum* of Hume Campbell were authority, *he* does not state the doctrine which he is cited to support. He says merely that " If a statute speaks of *matters* known at common law, it must *as to that matter*, be construed and extended according to the common law." In support of his position Hume Campbell cites Coke Litt. 381, Hobart 96 and 6 Mod. 142. Of these three authorities Mr. Wickham selected Hobart as auxiliary to the State Trials. Hobart is an ancient book not frequently found in modern libraries: he is not in mine; and from the abrupt manner in which this motion has been started upon us and the extent of legal ground which it covers, I have not had time to hunt for that author through the town: whether he supports even Hume Campbell, I am, therefore, unable to say, I shall suggest a reason presently to render it probable that he does not. The other two authorities to which he refers do not support him. Coke Littleton has nothing like it: he gives, indeed, in the page referred to, three rules for the construction of statutes, as 1st. That one part of it is to be expounded by another; 2. That the words of an act of parliament must be taken in a lawful and rightful sense, and thirdly, *that construction must be made of a statute in suppression of the mischief and in advancement of the remedy, et qui hæret in litera hæret in cortice.* This is all he says upon the subject; and in all this we have nothing which resembles Mr. Hume Campbell's position.—The other authority to which he refers, 6 Mod.

143, it is remarkable, is also the argument of counsel, sergeant Pengelly; this learned sergeant asserts, indeed, a principle, which I believe, to be true; but it is one much more restricted and materially variant from that of Hume Campbell, and of course still more variant from that of Mr. Wickham; speaking of the phrase *arrest of judgment*, which had been used in a statute of William the 3d, as being a phrase known to the common law, he says, " when an act of parliament makes use of *such a term* generally, it shall receive the same sense that the common law takes it in and no other:" in support of which Pengelly cites, Hobart 97, 98, the very author and page cited by Hume Campbell, to support his doctrine: hence I think it probable that Hobart stops at the limits given by sergeant Pengelly. The result of the investigation is, that Mr. Wickham's broad principle, that a statute made in aid or affirmance of the common law, carries with it *all common law consequences* is reduced to this: that when a statute uses a common law *phrase*, *that phrase* shall receive the same sense in the statute which it had at common law; a principle to which he is very welcome, but which will do him no manner of good—so that down comes one of the pillars which supported this air-drawn argument.

Let us examine another: " if a new felony be created by statute no common law consequences follow:" In support of this doctrine the gentleman refers to 1 Hale's P. C. 354-5,

and the authority, at first view, seems to countenance his doctrine ; it requires, however, but to be more closely and extensively examined to perceive that the passage, in the light in which Mr. Wickham understands it, is not law: the passage is this, " If a man be attaint of piracy before commissioners of Oyer and Terminer grounded upon the statute of 28 H. 8, chap. 15, by indictment and verdict of twelve men according to the course of the common law, he forfeits his lands and goods by the statute of 28, H. 8, chap. 15, but this works no corruption of blood, because it is an offence whereof the common law takes no notice, and though it be enacted they shall suffer and forfeit as in case of felony, yet it alters not the offence." In support of this, Hale cites Co. P. C. cap. 49, p. 112:—but he adds, " *vide tamen contra* Co. Litt. sec. 745, p. 391. The passage in the latter author is thus : " There is also a felony punishable by the civil law, because it is done upon the high sea as piracy, robbery, or murder, whereof the common law did take no notice, because it could not be tried by twelve men.—If this piracy be tried before the Lord Admiral in the court of the Admiralty according to the civil law, and the delinquent there attainted, yet shall it work no corruption of blood nor forfeiture of his lands ; *otherwise it is, if he be attainted before commissioners by force of the statute of* 28, *H.* 8." Hence it appears that the common law consequence of attainder depended on the tribunal, the form of trial, and the law

under which the pirate was tried : since if tried before commissioners *under the statute*, the common law consequence of attainder did follow, although the felony did not exist at common law but was newly created by statute.— Hale himself in the page 355, qualifies the generality of his expressions in the passage just read. In the paragraph immediately succeeding it, he takes up the first branch of the position just read from Coke : " if a man be attainted *before the admiral* of treason or felony committed upon the sea, &c. *according to the course of the civil law*, yet it works no corruption of blood, &c. the manner of the trial being according to the course of the civil law, &c." He proceeds, " If there be an attainder of treason or felony done upon the sea, *upon this statute of 28th, H. 8, according to the course of the common law, it seems that the judgment thereupon works corruption of blood; because the commission itself is under the great seal warranted by act of parliament, and the trial is according to the course of the common law, &c.* " and with this agrees Co. Litt. sec. 745, p. 391, nay, I think farther, that if *the indictment of piracy* before such commissioners, upon the statute of 28, H. 8, be formed *as* an indictment at common law, to wit, *vi et armis and felonice, &c.* that he might be thereupon attainted and the blood corrupted." Hence in the opinion of Hale himself, it depended upon the form of the indictment and the tribunal, whether the common law consequence of attainder would follow a conviction for pira-

cy on this statute. The result is, that although a statute do create a felony unknown to the common law, yet common law consequences may follow a conviction upon it; which is precisely the reverse of the position contended for by Mr. Wickham. But if this point were conceded to the gentleman as relates to *attainder*, it would not avail him; because in order to extract from the common law, the rule which he applies analogically to the construction of our constitution and act of Congress, he must shew that when a statute creates an offence, and is silent as to accessories, no accessories are embraced by the statute. It will perplex the gentleman to shew this; at all events the research necessary to it would require more time than they have allowed us. The doctrine upon this subject so far as I have been able to trace it, is this; that when an act of parliament makes an offence and says nothing of accessories, they are nevertheless embraced; although it is true, that the peculiar wording of a statute may prevent that consequence. 1 Hale's P. C. 613. "It remains therefore that the business of this title of principal and accessary refers only to felonies whether by the common law, or by act of parliament. As to felonies by act of parliament, regularly if an act of parliament enacts an offence, *though it mentions nothing of accessories before or after*, yet virtually and consequentially those that counsel or command the offence are accessories *before*, and those that knowingly receive the offender are accessories *af-*

ter: Id. 614. "Though generally an act of parliament *creating a felony*, renders *consequentially* accessories before and after within the same penalty, yet the special penning of the act of parliament in such cases sometimes varies the case." Hence it is, that is from the special penning, that the statute of piracy extends only to principals. 2 Hale's P. C. 18.—Hale 632, "As in other felonies so in this, there are or may be accessories before and after; for though this be a felony by act of parliament *that speaks only of those that commit the offence*, yet consequentially and incidentally accessories before and after are included, *and so in every new statute making a felony* without speaking of accessories *before or after*." The statute of 5, H. 4, cap. 4, was a statute to prohibit the mulplication of gold or silver, that is alchymy, (vid. Wilson's edition of Hale's P. C. 644 and note *a*). This was an offence not existing in any shape at common law, and in truth, never existing any where but in imagination. Hale in the page just referred to, speaking of this statute, says, "And *although the statute mentions not accessories before or after*, yet this statute making the fact felony, doth *consequentially* subject accessories *before and after* to the penalty; though this be made a *quere* by Dyer 88, in Eden's case, *yet it seems now settled according to the opinion of my Lord Coke, P. C. cap.* 20, *that there may be accessories before and after*." Here the authority is conclusive of the point, that although a statute creates a new felony unknown to the common law, and

although it says nothing about accessories they are nevertheless comprehended as a necessary consequence or incident. I refer you also, sir, to page 704 of the same author, where the doctrine is refuted: and where on the authority of Sir Edward Coke, it is carried so far as to state, that when a statute makes a felony and expressly comprehends accessories before the fact, being silent as those after it, yet, notwithstanding the maxin *expressum facit cessare tacitum*, accessaries after are virtually included.—From this examination two conclusions are fairly deducible.

First, that when a statute creates a new felony unknown to the common law, although such statute says nothing about accessories to that felony, yet they exist and are punishable under the act.

Secondly. That accessories are *not* the mere creatures of the common law; they may derive their existence from a statute *solely*, and that by mere implication under that statute.—What, then, becomes of the gentleman's nice tissue, his web so delicately put together and waving and glittering in the sun? It breaks and vanishes at the touch.

Since then accessories are not the creatures merely and solely of the common law, it makes no difference whether the common law exists here or not: accessories may nevertheless exist.

Since a statute creating an offence, impliedly

embraces accessories, not by the operation of common law, but by the reason and nature of things; an American statute may impliedly embrace assessories, since whatever we may think of the existence of the common law in this country, no American, I hope, will doubt that reason and its deductions may exist here.

But let us admit for the sake of argument what is certainly disproved: that accessories are the mere creatures of the common law; and let us also admit that our constitution and act of congress do not embrace accessories: is it so very clear that we have no right to resort to the common, *in this case*, to implicate accessorial traitors. I do not, myself, think this enquiry necessary: but it may appear so to you; and I would leave no subject untouched which the court may consider as involved in the debate.

It would not be very bold in me, sir, to argue for the existence of the common law *en masse* in this country. Do not let it for a moment be understood that I mean to argue for this; I say only that it would not be very bold in me to do this; and I say so because a majority of the federal judges, so far as their opinions have been made known, have held that opinion. In Worrel's case, cited from Dallas, the court was divided; Judge Chase thought the common law not in force, Judge Peters, thought otherwise. In a subsequent case, and that a criminal one, I mean the case of Williams, Judge Ellsworth, held that the whole of

the common law was in full force, and even that unnatural and absurd idea that a man is forever the subject of that country in which it is the pleasure of his parents that he shall be born.—Mr. Tucker informs us that Judge Washington was also of opinion, that the common law of England is in force here. These are all the opinions of which I have heard. Having thus the majority of the federal Judges in favor of the opinion, that the common law of England is in force here, I repeat that it would not be very bold in me standing before a federal court, to insist on the full operation of the common law, together with all its consequences, and its imputed offspring, accessories among the rest.—But I will not avail myself of this "vantage ground." My own opinion is a different one. I take the principle with much greater restriction, and on this head submit these reflections to the consideration of the court.

When a technical term is borrowed from any art or science, we look to that art or science to ascertain its import and signification. This is a rule of reason. It is the foundation of the principle cited by sergeant Pengelly from Hobart, that when a statute adopts *a common law term*, you take that *term* in its common law meaning. It is the foundation, too, of a paragraph in one of the most luminous and masterly state papers that ever fell from the pen of man: I mean the celebrated report of the Virginia committee in 1799, 1800, from which I beg leave to read a short extract, relative to our pre-

sent enquiry :—" Deeply impressed with these opinions, the General Assembly of Virginia, intruct the senators and request the representatives from this state in congress, to use their best efforts, to oppose the passing of any law founded on or recognizing the principle lately advanced that the common law of England is in force under the government of the United States, excepting from such opposition, such particular parts of the common law, as may have a sanction from the constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government; and excepting also such other parts thereof as may be adopted by congress as necessary and proper for carrying into execution the powers expressly delegated." Here we find the recognition of the principle which takes common law phrases in the common law sense. Upon the same ground Judge Iredell in the case of Fries states in effect, that the contitutional terms of *our* definition of treason being borrowed from the British statute, the framers of our constitution intended to adopt the meaning of those terms as expounded in the parent country.

Let us apply these principles. Whence do we derive the particular treason of levying war? From the British statute *immediately;* but *originally* from the common law. Sir Edward Coke in his third institute gives us a commentary on the statute of Edward III. He divides it into members and expounds each of them as

he goes along:—when he comes to the words of the statute "*ou si home leva guerre encounter notre seignior lé roy*"—if a man levy war against our lord the king, he says, "this was high treason *by the common law*"—although then the *words* of our definition be derived immediately from the statute, yet as *the species of treason levying war*, is transplanted from the common law, have we not a right to go to the fountain head, and ascertain there how much ground it covered: what was the nature of the treason, what its extent and limits? I do not speak of common law treasons at large, but this particular treason of levying war: if we have a right to go to the common law for this purpose, we shall discover that it comprehended all who were leagued in the general conspiracy, whether they themselves actually levied the war or caused it to be levied by others.—I submit this idea to the court not as one which I have had time to weigh and digest; but as one which they may perhaps find not unworthy of consideration. But let me go still farther in my admissions: let me admit not only that accessories are the creatures of the common law, but also that the common law, is not in force in this country, and further that our statute does not comprehend accessories: still before the prisoner can avail himself of these admissions, it must be shewn that he is an accessory: or in other words that the part which he bore in this treason is such as would *have* made him an accessory in felony. Gentlemen say that all are accessories who are not

actually present at the offence:—We, on the contrary contend that even in inferior felonies a man may be a principal without actual presence. Let us examine this question. The law takes a distinction between actual and legal presence. A man may be legally present, although actually absent; and, even in felony, *legal* presence makes a man as much a principal as *actual* presence. I beg leave to introduce a series of cases which go to unfold and establish this distinction; and I will preface them with this remark, that you will find, in the progress of these cases, the sphere of legal presence perpetually extending itself in proportion to the nature of the crime and the extent of theatre which it requires for its perperation. I proceed to lay the cases before you. 1 Hale's P. C. 439—" if divers persons come to make an affray, &c. and are of the same party and come into the same house, but are in several rooms of the same house and one be *killed* in one of the rooms, those that are of that party and that come for that purpose, though in the other rooms of the same house, shall be said to be present." Here the house is the theatre, and it is required that those who are to be implicated as principals shall be in the other rooms of the same house. The next is the case of the Lord Dacre, stated in the same page; it is this: " The Lord Dacre and divers others came to steal deer in the park of one Pelham; Rayden one of the company killed the keeper in the park, the Lord Dacre and the rest of the company being in

other parts of the park, it was ruled that it was murder in them all, and they died for it." Here as the park was the theatre of the meditated crime the scale of proximity is enlarged, and it was enough that the Lord Dacre and his associates were in the same park, to implicate them in the guilt. The next is Pudsey's case, which is thus stated, 1 Hale's P. C. 534: Pudsey and two others, viz. A. and B. assault C. to rob him in the high way, but C. escapes by flight, and as they were assaulting him, A. rides from Pudsey and B. and assaults D. out of the view of Pudsey and B. and takes from him a dagger by robbery, and came back to Pudsey and B. and for this Pudsey was indicted and convicted of robbery; *though he assented not to the robbery of D. neither was it done in his view;* because they were all there assembled to commit a robbery, and this taking of the dagger, was in the mean time." Here as the high way, and the whole forest were the scene of action, a still less degree of proximity was required than in either of the preceding cases, and indeed no limit of proximity is stated at all. But this case of Pudsey is irresistibly strong in another point of view, and contains a principle which covers the case at bar completely; that principle is this: Pudsey and his colleagues were leagued for the general purpose of robbing; they went out upon this purpose; and although Pudsey was *not only absent at the particular act of robbing D. but gave no assent to that particular act*, yet he was involved in the guilt of it, and suffered accord-

ingly. The same author, page 537, contains a case which is, if possible, still stronger to the same purpose; it is the case of two men who go out for the purpose of robbing on the high way, or committing a burglary, although one only commit the offence, and the other, so far from being present, is actually engaged in the perpetration of a different crime at a different place, yet this other is equally involed in the offence committed by the first. Hence it is not *actual presence* which makes a principal in felony: it is merely their going forth leagued in the same general design, and the willingness to co-operate for effecting the common purpose. Foster 349-50, thus treats the subject—" When the law requireth the presence of the accomplice at the perpetration of the fact in order to render him a principal, it doth not require a strict, actual, immediate presence, such a presence as would make him an eye or ear witness of what passeth. Several persons set out together upon one common design, be it murder or other felony or for any other purpose, unlawful in itself, *and each taketh the post assigned him;* some to commit the fact, others to watch at proper distances and stations to prevent a surprize, *or to favor if need be, the escape of those who are more immediately engaged:* They are all, provided the fact be committed, in the eye of the law present at it; *for it was made a common cause with them, each man operated in his station towards the same common end; and the part each man took, tended to give countenance, encouragement, and*

protection to the whole gang, and to ensure the success of their common enterprise." The reason of the law is the soul of the law. What is the reason then which according to Foster, constitutes this legal presence?—It is, that the cause is a common cause; that each man operates in his station towards the same common end; that the part each man takes, tends to give countenance, encouragement, and protection to the whole gang, and to ensure the success of their common enterprize. Whosoever, in any crime, performs a part within this description, is legally present and a principal in that crime. Foster proceeds—" I will not here multiply cases upon the head of constructive presence. This may be sufficient by way of illustration. Others *founded in the same principle of mutual concert, aid and protection*, will fall in, in their proper places:" In page 353-4, he keeps this promise —" A general resolution against all opposers whether such resolution appeareth upon the evidence to have been actually and explicitly entered into, or may be reasonably collected from their number, arms, or behaviour at or before the scene of action; such resolutions so proved have always been considered as strong ingredients in cases of this kind. And in cases of homicide committed in consequence of them, every person *present in the sense of the law*, when the homicide hath been committed, hath been involved in the guilt of him that gave the mortal blow. The case of Lord Dacres mentioned

by Hale, and of Pudsey, reported by Crompton and cited by Hale, turned upon this point. The offences they respectively stood charged with as principals, *were committed far out of their sight and hearing;* and yet both were holden to be present. *It was sufficient that at the instant the facts were committed they were of the same party and upon the same pursuit, and under the same engagement and expectation of mutual defence and support with those who did the facts.*"

Let us apply the reasoning and principles of those cases to the case at bar. In order to do this with propriety, we must consider the nature of the crime charged upon the prisoner; the theatre requisite for its perpetration and the various parts to be performed in promotion of the general purpose. The charge in the indictment is treason, in levying war against the United States: the objects imputed to the prisoner are the seizure of Orleans, and the separation of the States. We shall make a mistaken application of the doctrines just investigated, if we apply them to the overt act on Blennerhassett's island. That assemblage was not the object, the end, the castrophe and consummation of the treason; it was a mere transient and incidental effect of it. At the time then of this assemblage we are to consider the prisoner's local position, not in reference to the assemblage, but to the general and grand object of the treason; not in reference to the island, but to the great theatre which the treason required, and on which it was acting; from New-York to

Orleans. The gentlemen on the other side, will not complain of this as a new idea. Mr. Wickham himself urged it, and reiterated it for a different purpose, that the overt act was not the treason but merely evidence of it. When then, in the language of the cases just read, we enquire whether the prisoner and the men on the island were of the same party and upon the same pursuit, the question relates not to the island, which was certainly not their pursuit, but to the great and splendid purpose of seizing Orleans, and rending the union forcibly asunder; and in this light "*they were of the same party and upon* "*the same pursuit;*" in this light they were "*under the same engagement and expectation of* "*mutual defence and support; it was a common* "*cause with them, each man operated in his sta-* "*tion, at one and the same instant towards the* "*same common end, and the part each man took,* "*tended to give countenance, encouragement,* "*and protection to the whole gang, and to en-* "*sure the success of the common enterprize:*" so that within every reason and principle assigned for the constitution of legal presence, they were all equally present. What though the prisoner gave no express assent to the particular meeting on the island; nether did Pudsey, in the case cited, assent to the particular robbery of D. by A.—but the purpose of Pudsey and A. was the same common purpose which involved them in the same common guilt. So the purpose of the prisoner and the men upon the island was a common purpose, and therefore their guilt

is the same. The part, therefore, which the prisoner has in this transaction, is such an one, as in the case of felony would make him a *principal* and not an *accessory* as the gentlemen contend.

The result is in perfect harmony with the decision of the supreme court in the case of Bollman and Swartwout. There we have seen that remoteness from the scene of the treason makes no odds: it is the being leagued in the same common cause, and co-operating towards the same general purpose, which gives to each man a legal presence although thousands of miles off and makes him as much a principal as those who are actually present.

Having ascertained that the prisoner can in no view of *the law* be considered as an accessary in this case, let us enquire whether he can be so considered *in reason*.

A plain man who knew nothing of the curious transmutations which the wit of man can work, would be very apt to wonder by what kind of legerdemain Aaron Burr had contrived to shuffle himself down to the botton of the pack as an accessory, and turn up poor Blennerhassett as principal in this treason. It is an honor, I dare say, for which Mr. Blennerhassett is by no means anxious; one which he, has never disputed with Colonel Burr, and which I am persuaded, he would be as little inclined to dispute on this occasion, as on any other. Since, however, the modesty of Colonel Burr declines the first rank, and seems disposed

to force Mr. Blennerhassett into it in spite of his blushes, let us compare the cases of the two men and settle this question of precedence between them. It may save a good deal of troublesome ceremony hereafter.

In making this comparison, sir, I shall speak of the two men and of the part they bore as I believe it to exist and to be substantially capable of proof: although the court has already told us, that as this is a motion to exclude *all* evidence, generally, we have a right, in resisting it, to *suppose* the evidence which is behind, strong enough to prove any thing and every thing compatible with the fact of Burr's absence from the island. If it will be more agreeable to the feelings of the prisoner to consider the parallel which I am about to run, or rather the contrast which I am about to exhibit, as a fiction, he is at liberty to do so; I believe it to be a fact.

Who then is Aaron Burr, and what the part which he has borne in this transaction? He is its author; its projector; its active executor. Bold, ardent, restless and aspiring, his brain conceived it; his hand brought it into action. Beginning his operations in New-York, he associates with him, men whose wealth is to supply the necessary funds. Possessed of the main spring, his personal labour contrives all the machinery. Pervading the continent from New-York to New-Orleans, he draws into his plan by every allurement which he can contrive, men of all ranks, and all descriptions. To youthful

ardour he presents danger and glory; to ambition, rank and titles and honours; to avarice the mines of Mexico. To each person whom he addresses, he presents the object adapted to his taste: his recruiting officers are appointed; men are engaged throughout the continent; civil life is indeed quiet upon its surface: but in its bosom this man has contrived to deposit the materials which, with the slightest touch of his match produces an explosion to shake the continent. All this his restless ambition has contrived; and in the autumn of 1806, he goes forth for the last time, to apply this match.—On this excursion he meets with Blennerhassett.

Who is Blennerhassett? A native of Ireland, a man of letters, who fled from the storms of his own country to find quiet in ours. His history shews that war is not the natural element of his mind; if it had been, he would never have exchanged Ireland for America. So far is an army from furnishing the society natural and proper to Mr. Blennerhassett's character, that on his arrival in America, he retired even from the population of the Atlantic States, and sought quiet and solitude in the bosom of our western forests. But he carried with him taste and science and wealth; and "lo, the desert smiled." Possessing himself of a beautiful island in the Ohio, he rears upon it a palace and decorates it with every romantic embellishment of fancy. A shrubbery that Shenstone might have envied, blooms around him; music that

might have charmed Calypso and her nymphs, is his; an extensive library spreads its treasures before him; a philosophical apparatus offers to him all the secrets and mysteries of nature; peace, tranquility and innocence shed their mingled delights around him; and to crown the enchantment of the scene, a wife, who is said to be lovely even beyond her sex and graced with every accomplishment that can render it irresistible, had blessed him with her love and made him the father of her children. The *evidence* would convince you, sir, that this is but a faint picture of the real life. In the midst of all this peace, this innocence, and this tranquility, this feast of the mind, this pure banquet of the heart—the destroyer comes—he comes to turn this paradise into a hell—yet the flowers do not wither at his approach and no monitory shuddering through the bosom of their unfortunate possessor, warns him of the ruin that is coming upon him. A stranger presents himself. Introduced to their civilities by the high rank which he had lately held in his country, he soon finds his way to their hearts by the dignity and elegance of his demeanor, the light and beauty of his conversation, and the seductive and fascinating power of his address. The conquest was not a difficult one. Innocence is ever simple and credulous; conscious of no designs itself, it suspects none in others; it wears no guards before its breast; every door and portal and avenue of the heart is thrown open, and all who choose it enter. Such was the state of Eden,

when the serpent entered its bowers. The prisoner in a more engaging form, winding himself into the open and unpractised heart of the unfortunate Blennerhassett, found but little difficulty in changing the native character of that heart and the objects of its affection. By degrees he infuses into it the poison of his own ambition; he breathes into it the fire of his own courage; a daring and a desperate thirst for glory; an ardor panting for all the storm and bustle and hurricane of life. In a short time the whole man is changed, and every object of his former delight relinquished. No more he enjoys the tranquil scene: it has become flat and insipid to his taste: his books are abandoned: his retort and crucible are thrown aside; his shrubbery blooms and breathes its fragrance upon the air in vain—he likes it not: his ear no longer drinks the rich melody of music; it longs for the trumpet's clangor and the cannon's roar; even the prattle of his babes, once so sweet, no longer affects him; and the angel smile of his wife, which hitherto touched his bosom with ecstacy so unspeakable, is now unfelt and unseen. Greater objects have taken possession of his soul—his imagination has been dazzled by visions of diadems, and stars and garters and titles of nobility: he has been taught to burn with restless emulation at the names of Cromwell, Cæsar, and Bonaparte. His enchanted island is destined soon to relapse into a desart; and in a few months, we find the tender and beautiful partner of his bosom, whom he

lately " permitted not the winds of" summer " to visit too roughly," we find her shivering, at midnight, on the winter banks of the Ohio, and mingling her tears with the torrents that froze as they fell. Yet this unfortunate man, thus deluded from his interest and his happiness —thus seduced from the paths of innocence and peace—thus confounded in the toils which were deliberately spread for him, and overwhelmed by the mastering spirit and genius of another—this man, thus ruined and undone, and made to play a subordinate part in this grand drama of guilt and treason—this man is to be called the principal offender; while he, by whom he was thus plunged and steeped in misery, is comparatively innocent—a mere accessory. Sir, neither the human heart nor the human understanding will bear a perversion so monstrous and absurd; so shocking to the soul; so revolting to reason. O! no Sir. There is no man who knows any thing of this affair, who does not know that to every body concered in it Aaron Burr was as the sun to the planets which surround him; he bound them in their respective orbits, and gave them their light, their heat and their motion. Let him not then shrink from the high destination which he has courted; and having already ruined Blennerhassett in fortune, character and happiness forever, attempt to finish the tragedy by thrusting that ill-fated man between himself and punishment.

Upon the whole, sir, *reason* declares Aaron

Burr the principal in this crime, and herein confirms the sentence of *the law*.

Before I conclude this point, I beg leave to notice some remarks of Mr. Wickham's on the act of congress, touching crimes against the United States, and which I omitted in the proper place. He says that congress were aware that the common law was not in force here, and consequently that accessories who are the creatures of the common law, would not be embraced by an act creating a felony in general terms: he infers this from their having prescribed the punishment of accessories in the case of piracy, and those who rescue after conviction of treason. I will make this remark upon the act of congress; whenever it mentions accessories to any crime it is for the purpose of distinguishing between the guilt and consequently the punishment of accessories before and after the fact. I mentioned before, the line which reason had drawn between them. Congress has observed this line. Accessories before the fact in piracy, are punished with death: those after it by fine and imprisonment. The XXIII Sec. of that act is confined merely to the case of rescous after acquittal, and its object is simply to keep the course of justice clear. Congress knew that in treason, all were principals from the nature of the crime, and that it was therefore unnecessary to implicate them in detail by a special act.

From what has been said, I trust it is clear, both in law, and reason, that Aaron Burr did

not derive his guilt from the men on the island; but imparted his own guilt to them: that he is not an accessary in the crime; but a principal, and therefore that there is nothing in the objection which demands a record of *their* conviction before we shall go on with our proof against him.

But admitting what is scarcely possible, that the court shall think otherwise, and shall deem Aaron Burr an accessorial offender in the treason, can you for this, shut out the evidence from the jury? The indictment does not charge Aaron Burr as an accessary; but as a principal. Whether he be a principal or not is the question of *fact* which the jury is sworn to decide. Will you, because of *your* impressions of this fact, from a partial view of the evidence, compel them to decide also upon that partial view? If you do, do you not thereby divest the jury of their proper and peculiar functions? The province of the jury should not be invaded, Sir; the invasion is big with danger and terror. I trust that you will see this subject in the awful light in which it really stands and that you will suffer the trial to take its natural course.

The fourth and last objection to the admission of our evidence is this: "That no evidence is relevant to connect the prisoner with others, and thus to make him a traitor by relation until we shew an act of treason in those others; and the assemblage on the island was not an act of treason."

The question which the court is here called on to decide, is, whether the assemblage on Blennerhassett's island was a levying of war. The gentlemen who hold the negative of this position must admit that the intention of that assemblage was a treasonable one; or else we cannot be debarred from proving it. They must admit that the individuals who composed that assemblage were enlisted by Aaron Burr, or by his subaltern officers; that they had marched by individuals to the mouth of Beaver, a place of partial rendezvous: that when collected there, they proceeded to Blennerhassett's island, another place of rendezvous; where they were to receive an accession of boats, men, provisions, arms and ammunition, under the command of Blennerhassett himself; that from the island they proceeded to the mouth of Cumberland, a place of general rendezvous for the expected forces from the east, and from the states of Virginia, Kentucky, Ohio, and Tennessee; that at the mouth of Cumberland they took in their commander in chief, the prisoner at the bar, with a considerable addition of men and arms, and proceeded to Baton Rouge, attempting the seduction of the officers and men at the several forts and garrisons of the United States, as they passed; which forts and garrisons were too weak to have resisted their passage with effect; that expecting the co-operation of the United States' troops, the project was to seize upon New Orleans, together with its bank, shipping, military stores, &c. to plant

the standard of treason and a separate empire in that city, and to rend from the union all that portion of territory which lies west of the Alleghany. All this they must admit, for this and more we are prepared to prove. The question then is, whether all these things admitted, the assemblage on the island was an overt act of levying war.

Here we are brought back to the constitution and act of congress; and the enquiry is what is *levying* war? Gentlemen on the other side speaking on this subject, have very artfully dropped the word *levying* altogether. "Shew us your open act of war," they exclaim; "*hard knocks*, says Mr. Lee, are things we can all feel and understand; where are the hard knocks?" "Where was this bloody battle, this bloody war?" cries Mr. Martin. No where, gentlemen; there was no bloody battle, there was no bloody war. The energy of a despised and traduced government prevented that tragical consequence. In reply to all this blustering and clamour for blood and havoc, let me ask calmly and temperately, does our constitution and act of congress require them? Can treason be committed by nothing short of actual battle? Mr. Wickham shrinking from a position so bold and indefensible, has said that if there be not *actual* force, there must be at least *potential* force—such as terror and intimidation struck by the treasonable assemblage. We will examine this idea presently. Let us at this moment recur to the constitutional definition of treason, or to

so much thereof as relates to this case. "Treason against the United States shall consist only in *levying war* against them:" not in *making* war; but in *levying* it. The whole question, then, turns on the meaning of that word, *levying*.

We know that ours is a motley language; variegated and enriched by the plunder of many foreign stores. When we derive a word from the Latin, the Greek, or any other foreign language, living or dead, philologists have always thought it most safe and correct to go to the original language, for the purpose of ascertaining the precise meaning of such word. *Levy*, we are told by all our lexicographers, is a word of French origin: It is proper therefore that we should turn to the dictionaries of that language to discover its true and real meaning; and I believe we shall not find that when applied to war, it ever means *to fight* as gentlemen on the other side would have us to believe. Boyer's Dictionary is before me, sir; and I am the more encouraged to appeal to him, because in the case of Bollman and Swartwout, your honor, in estimating the import of this very word, thought it not improper to refer to the authority of Doctor Johnson. "*Lever*," the verb active, signifies, according to Boyer, "to lift, heave, hold or *raise up*." Under the verb he has no phrase applicable to our purpose; but under the substantive, *levee*, he has several; I will give you them all:

Levee d'un siege; the raising of a siege.—

Levee des fruits; gathering of fruits, crop or harvest.

La Levee du parlement Brittannique; the raising or recess of the British parliament: Levee (collecte de deniers) a levying, raising or gathering: *Levee de gens de guerre, levying, levy or raising of soldiers: Faire des levees de soldats; to levy* or *raise soldiers.* So that when applied to fruits or taxes, it means *gathering* as well as *raising;* when applied to soldiers it means *raising* only; not *gathering, assembling* or *bringing them together even;* but merely *raising.* Johnson takes both these meanings, as you mentioned in the case of Bollman and Swartwout: but in the original language we see that *levying*, when applied to soldiers, means simply the *raising* them, without any thing farther: in military matters, *levy* and *raising*, if Boyer may be trusted are synonimous.

But to ascertain still more satisfactorily the meaning of this word *levy*, let us look to the source from which we have borrowed the whole definition of treason: the statute of the 25, E. 3. The statute is in Norman French, and describing the treason of levying war, uses these words, "*si home leve de guerre contre nostre seigneur le roy en son royalme.*" In a subsequent reign, I mean the factious and turbulent reign of Richard the II. when the statute of Edward, although unrepealed, was forgotten, lost and buried under the billows of party rage and vengeance, it became at length, necessary for parliament to interfere and break to pieces

the engine of constructive treason: and in the 21st year of Richard the II. a statute was passed which may be considered as a parliamentary construction of that of Edward the III. In that statute the treason of levying war is thus explained, "*celuy que levy le people and chivache en counter le roy a fair guerre deins son realme.*" Here the French verb, *leve*, is the same as that used in the statute of Ed. with an unimportant othographic variation; and here, it is clearly contradistinguished from the actual war:—the *levy* is of *men* and *horses*, *for the purpose of making war;*—and the *levy* would have been complete, although the *purpose* had never been executed: I consider, therefore, the statute of Richard, as not only adding another authority to that of Boyer, to prove that the extent of the French verb *levee*, when applied to soldiers, goes no farther than the *raising* them; but I consider that statute also as a parliamentary exposition or glossary of the phrase *levy de guerre* in the statute of Edward. In this latter opinion, I am supported by 1. Hale 85, who speaking of the statute of Richard, says "these four points of treason" settled by the parliament of Richard, seem to be *included* within the statute of 25 E. 3. *as to the matter of them* with these differences. 1. The forfeiture is extended further than it was formerly, namely, to the forfeiture of estates tail and uses. 2 Whereas the ancient way of proceeding against commoners was by indictment, and trial thereupon by the country, the trial and judgment

is here appointed to be in parliament. 3. But that wherein the principal inconvenience of this act lay, was this, that whereas the statute of 25 Ed. 3. required an overt act to be laid in the indictment and proved in evidence, this hath no such provision." These are all the differences which he takes between them. Hence it is clearly the opinion of Hale, that the treason of levying war is *materially* the same in both statutes. For if the statute of Edward required *actual war*, *hard knocks*, *bloody battle*, to constitute treason, while that of Richard, made the *mere preparation* for those purposes treason, would it, could it have escaped such a mind as Hale's; more particularly when he was especially employed in discriminating between the two statutes, and marking the points of difference, to the disadvantage of the statute of Richard. If nothing short of actual war will satisfy the statute of Edward, while that of Richard covers so much more ground as to comprehend the first act of recruiting and to make that treason, how can the former be said to include the latter? it might with as much propriety be said, that a field of battle includes the kingdom within which it lies, or that the less includes the greater. Yet of this absurdity Hale has been guilty, unless it be conceded that the statutes of Richard and of Edward are materially the same: if in conformity to the opinion of Hale, this point be conceded, then as it is indisputably clear and certain that the statute

of Richard makes levying of war, to consist in the preparations for that war, in the raising of men, horses, &c. for the purpose of making war, so also, under the statute of Edward, levying war means the preparations for that war. And if this construction of the statute of Edward be admitted, we have but to remember that our definition of treason is borrowed from this statute, and to ask whether the same words, *levying war*, in the English and American statutes mean the same thing.

Confiding in the candour of this investigation and in the truth of the conclusion to which it has led me, I should myself have thought the mere enlistment of soldiers, of itself, an overt act of levying war. I should think such enlistment too, sufficient to satisfy *the reason* of the statute of Edward and consequently that of our constitution and act of congress in requiring an overt act to be proven. What is the reason avowed by all the books?—It is, because the secret intentions of the man lie beyond the ken of mortal sight. They can be known only to the man himself, and to that Being whose eye can pierce the gloom of midnight, and the still deeper gloom that shrouds the traitor's heart.—To his fellow men those intentions can be manifested only by some external or overt act: I consider the phrase *overt act* as intended to be in contrast with *secret intention*; but whenever this secret intention ripens and breaks out into an act, of which the human senses can take cognizance, I consider the reason of the law as be-

ing satisfied; we are then relieved from the necessity of prying into and guessing at the secrets of the heart. It is not pretended that any case ever occurred to contradict this idea until the case which is reported by Ventris; which has been said by some modern English writer, and pronounced by your honor, to settle the principle that the mere enlistment of soldiers is not sufficient to costitute the levying of war.—Permit me, with the utmost deference and respect for your honor, to examine that case and see whether it justifies a conclusion so broad.—That case, it is to be observed, is adjudged under the statute of the 25 Ed. 3. Now it requires but to adopt for a moment, the idea which I have shewn to be sanctioned by Lord Hale, that the statute of Richard, explains by a periphrasis the more condensed definition of that of E. to perceive the reasoning and whole scope of the case in Ventris:—"If a man", says the statute of Ed. "shall levy war against our Lord the King *in his realm:*" "or he", says the statute of Richard, "who levies men and horses, against the king, *to make war in his realm.*"—The *levy*, then, is a totally different thing from the *war*, the *levy*, is the *preparation;* the *war* is the *purpose;* but it is "to make war *in his realm.*" Wheresoever then the *levy* is made, the *purpose*, must be to make *war in the realm.* Hence it is very clear, that although the levying should be within the realm, the statute would not be satisfied, *unless the purpose* also was to make *war within the realm.* It is upon this latter point

alone that the case in Ventris turns, and not upon the scene of the enlistment, nor the insufficiency of the fact of enlistment. The case in Ventris is that of Patrick Harding, 2 vol. 315, 16: The charge in the indictment, is compassing the death of the King and Queen, (William and Mary) and the overt act laid, is *levying war* by raising divers soldiers and men armed and *to be armed*, *(armatos et armaturos)* " et milites sic ut præfertur levatos *extra* hoc regnum angliæ misit et iter secum suscipere procuravit ad sese jungendos aliis hostibus, &c." the special verdict finds that the prisoner did " list, hire, raise and procure sixteen men, subjects of this kingdom, at the time, &c. and those sixteen men so listed, hired, raised, and procured, *did send out of this kingdom*, into the kingdom of France, to assist and aid the French king, &c."—" Upon this special verdict found, " the " Lord Chief Justice, Justice Gregory, and " Justice Ventris, who were then present at the " sessions, conceived some doubt ; for they " were of opinion, that it did not come within " the clause of the statute of 25 Ed. 3. *of levying war:* for that clause is, if a man levy war " against our sovereign lord the king *in his* " *realm:* and by the matter found in the special " verdict, it appears, that these men were listed and sent beyond sea, to aid the French " king." In the original report, the words *in his realm* are printed in Italics, as marking the particular part of the statute on which the opinion rested. But suppose the purposed war

had been *within* the realm: is not the implication from the reasoning of the court irresistible, that the enlistment would have been a sufficient overt act of levying? Is it not clear that the court in this case considered the statute of Edward as explained and expounded, by that of Richard II. that they distinguished between *the levy* and *the war;* and required according to the express letter of the second statute, that not only the preparation, but the *purposed war* should be *within the realm?* But it has been said, that if the enlistment had been a sufficient overt act of levying war, then war had been levied within the realm. But this is confounding the levy with the war, the means with the end, the preparation with the purpose: it is losing sight of the requisition of the statute that not the levy merely; but the intended war shall be within the realm. Besides, when the court *avow* the reason of their opinion; when they declare it to consist (not in the insufficiency of the fact of preparation, but) in the fact that the proposed war was to be *out of the realm*, with what propriety can it be argued that their opinion rested, not on the reason which they themselves avow, but on one which they do not avow and which they disapprove as far as they can do it by implication? If it was immaterial *where* the war was to be, if the enlistment of men was in itself insufficient as an overt act of levying war, why did not the court take this ground at once and say that the mere enlistment of men was not an overt act of levying war? The answer is obvi-

ous; it was because they considered the statute as requiring that the purposed war should be within the realm; whereas the war as found by the jury was intended to be out of the realm; and to my judgment, the inference is equally obvious that if the war had been found to be intended within the realm, the court would have had no doubt, that the war had been levied by the enlistment. The case in Ventris, therefore, is so far from warranting the conclusion, that the mere enlistment is not a sufficient overt act of levying war; that in my conception, it warrants the conclusion, that it is a sufficient act. And if the case in Ventris does not justify the doctrine, that enlistment is insufficient as an overt act, I defy the gentlemen to produce a case, *not dependent on that*, which does warrant it.—But let me yield the authority of this case, let me admit it to prove, what it has been supposed to prove, still it impairs the etymology of the word *levying*, no farther than this, that raising men only, is not levying war. How far then are we to carry the meaning of this word *levy?* Shall we add the other meaning of the word, in the original language, and say that the men must not only be raised, but that they must be brought together, or assembled: Be it so; and I contend that neither the courts of this country or of England, have ever required more than *an assemblage* of men with treasonable intent; whether they be armed or unarmed; whether they use force or not; whether their numbers be great or small; still according to authority the treason is complete.

Arms are not necessary. Whenever the English books have appeared to require them, it will be found, on examination, to be in the statement of some hypothetic case, *where the overt act is to contain, within itself, evidence of the treasonable intent:* but whenever *the treasonable intent* can be proved by evidence *extrinsic of the overt act*, arms have never in any case been required. 1. Hale 131, for example, puts these cases; "As where people are assembled in great numbers armed with weapons offensive or weapons of war—if they march thus armed in a body—if they have chosen commanders or officers—if they march *cum vexillis explicatis*, or with drums or trumpets or the like." In all these cases, there is not a word of any extraneous evidence of the treasonable intent: but that intent was to be found in the appearance and warlike array of the assemblage itself. Mr. Dallas, whose legal opinions are certainly entitled to very high respect, when he was of counsel for John Fries, and was consequently not interested in extending the doctrine of treason, admitted the distinction which I have here taken. In page 100 of Fries's trial, he is reported to have said—"As on the one hand, I grant that the *circumstance of military array* is not *necessary* to an act of treason, *if the intention is traiterous*, so I insist on the other hand, that the circumstance of military array will not constitute treason, without such intention." In this he is supported by all the English authorities. Lord Hale who seems more disposed than any

other writer or Judge, to narrow the doctrine of treason, no where says that arms are necessary. Speaking of the difficulty of defining what constitutes levying war, he says, it is commonly *expressed* by the words *more guerrino arraiati*, 1. Hale's P. C. 131, that is, in treating generally of the subject or describing the offence in indictments it is so commonly *expressed;* and in this light he is understood by Foster 208.—So far indeed is Lord Hale from requiring military array, that by the strongest implication he declares it unnecessary. "Again, the actual assembling of many rioters in great numbers to do unlawful acts, if it be not *modo guerrino* or *specie belli*, *as if they have no military arms nor march or continue in the posture of war*, may make a great riot, yet doth not *always* amount to a levying of war." What is the candid inference from this passage? that *sometimes* such an unarmed assemblage, without the warlike array or the shew of war, *may* amount to a levying of war: for if this be not the inference, the word *always* used by Lord Hale, has no signification whatever. I affirm that no case can be produced to shew arms to be necessary; that no description of an overt act in which arms form a necessary ingredient can be adduced, unless when the overt act is itself to afford the only evidence of the design; nor can even the *dictum* of an elementary writer be adduced to prove that arms are necessary. That on the contrary, every writer and every judge who has had occasion to mention the subject directly, has

declared arms to be unnecessary, if the intention can be otherwise proven. "I do not think, says Foster 208, any great stress can be laid on such distinction," (being armed or unarmed.) It is true that in case of levying war, the indictments generally charge that the defendants were armed and arrayed in a warlike manner; and where the case would admit of it, the other circumstances of swords, guns, drums, colours, &c. have been added. But I think the merits of the case have never turned singly on any of these circumstances."

"In the cases of Damaree and Purchase," he continues, "which are the last *printed* cases which have come in judgment on the point of constructive levying war, there was nothing *given in evidence* of the usual pageantry of war, no military weapons, no banners or drums, nor any regular consultation previous to the rising; and yet the want of these circumstances weighed nothing with the court, though the prisoner's counsel insisted much on that matter." In the same paragraph he adds, what confirms Mr. Dallas' distinction—"The *true criterion* in all these cases is *Quo animo*, did the parties assemble." East in his Crown Law, page 67, collects the authorities together, and proves the truth of Foster's position, that arms or military array are unnecessary; and that the intention is the *criterion*. Judges Chase, Iredell, and Foster, expressly declare themselves of Foster's opinion. I beg leave to read a short paragraph

from Judge Chase's charge to the jury on the trial of Fries, 197. "The court are of opinion, that military weapons (as guns and swords mentioned in the indictment) are not necessary to make such insurrection or rising amount to levying war; because numbers may supply the want of military weapons, and other instruments may effect the intended mischief: *The legal guilt of levying war may be incurred without the use of military weapons or military array.*" I think I may now consider it as proven, that arms are not necessary to the constitution of treason. Since then *no arms* were *necessary* to make the assemblage on the island a treasonable assemblage, it is scarcely worth while to notice Mr. Wickham's observation, that the rifles which are proven to have been in the hands of the men there, are not necessarily military weapons. I suspect, however, that there may yet be those living in Great Britain who remember the name of General Morgan, and who can bear witness that a rifle in the hands of a back-woodsman of America, is a military weapon, emphatically, and as formidable a one too as a soldier need wish to encounter.

But we are told, that if *arms* be not necessary, *force is necessary* to make an assemblage treasonable: let us now enquire if this be so.

On this branch of the enquiry, I beg leave to premise that in the several cases on this subject the word *force* is generally used figuratively; intended to signify the assembled body and not any deed of violence actually committed by

them: thus in Vaughan's case, it is stated, that he came with an *armed force;* and in the opinion of the presiding judge of the court, in the motion to commit the prisoner in March last, we also find this word used in this figurative sense—page 23: after saying it is clear, that an intention to commit treason, is an offence entirely distinct from the actual commission of that crime, the judge proceeds. "War can only be levied by the employment *of actual force.* Troops must be embodied; men must be assembled in order to levy war." The troops then being embodied, the men being assembled, war is hereby levied; force is employed; not that a blow is actually struck; but that there is a body capable of using force, if they please to use it. Sir, as to the demand of actual violence, there is not an English authority which countenances it; they concur in disclaiming it. They take the distinction between the *bellum levatum* and the *bellum percussum:* thus Foster 218.—"An assembly armed and arrayed in a warlike manner, for any treasonable purpose, is *bellum levatum* although not *bellum percussum. Listing and marching are sufficient overt acts, without coming to a battle or action.*" 1. East 67, repeats this doctrine, and cites various cases in support of it. Salkeld's Reports, 635—"there may be levying war without actual fighting." Same case, 5 St. Trials 37. There is not a single English authority which requires force, that is actual violence, or the *bellum percussum:* the assemblage and clear evidence of the treasonable

design have always been held sufficient. The case of Purchase, has been erroneously stated from the bar. The case did not turn on the question of force or no force; the difficulty in this case, arose from this circumstance; it appeared that Purchase knew nothing of the designs and motives of the rising: it was questioned therefore, whether the act of others could be imputed to him. This is proven by the original trial itself; and so Foster 215, considers it. "With regard to Purchase, there was some diversity of opinion among the Judges present at his trial, because it did not appear upon the evidence that he had any concern in the original rising, or was present at the pulling down any of the houses, or any way active in the outrages of the night, except his behaviour at the bonfire in Drury Lane, whither he came by mere accident, for aught appeared to the contrary;" but suppose he had been concerned in the original rising, or had been present at the pulling down the houses, and encouraged it by his voice; would there have been any doubt? The reasoning of the case shews that there would not: and even as it was, although three of the judges *doubted*, the majority of them agreed in his guilt, and he was condemned accordingly. The case in Kelyng 75, on which the gentleman so much relies to prove the necessity of force, is one of those cases in which the treasonable intent is only manifesed by the employment of force and the extent to which it is carried. It was the case of a riot, a sudden

ebullition of popular passion preceded by no concert, no arrangement, and a case therefore in which the intent was unsusceptible of proof, except by the acts of the mob. It was a case, I will add, in which any kind of force would not have been sufficient to make it treason; for if they had stopped with pulling down one bawdy house, or opening one prison to let out a favourite prisoner, that would have been a riot merely; they continued, however, together, and in action for two days, and shewed by the extent and nature of the violence which they practised, that their intent was general and universal. From such a case surely nothing can be inferred which will fairly apply to a case so different as that at bar; a case in which there was a previous concert and arrangement, and a case in which the *quo animo*, the criterion of the crime, is susceptible of proof independent of the assemblage. Let us come now to our own country, and see if our adjudications require actual force. Before I proceed to the examination of Fries' case, let me remind you of an observation of Mr. Randolph's, equally elegant and true; "an elementary principle resulting from the circumstances of a particular case, and to be found in that single case only, should never be applied except to a case parallel in its circumstances." Nothing can be more just, than this remark; and it is by violating the rule which it contains, that so much jarring, so much irreconcilable discord, so much Babylonian confusion, is seen to exist among our cases. With

this remark let us come to the trial of Fries.—What were the circumstances of that case?—There had been actual violence; it was also a disorganized and disorderly riot, and the reasoning of the British cases applied to its character. But as there had been violence in that case, and the judge in charging the jury, was giving a description of treason adapted to the case at bar, what was more natural than for him to introduce that feature of the case into his description. It will be found that Judge Chase, considers the case of Fries as a riot, and reasons upon it in that point of view, applying to it all the English doctrine of riot, where violence as before remarked, is the only evidence of treasonable intent. But if each *dictum* of the Judge in delivering that charge is to be considered as an abstract truth, it will be easy to find in that charge, the clearest indications of his opinion, that violence is not necessary. Thus, in page 106, "It is the opinion of the court, that any insurrection, or rising, of any body of people within the United States, *to* attain or effect by force or violence, any object of a great public nature, or of public and general, (or national) concern, is a levying of war against the United States, within the contemplation and construction of the constitution." Here it is not the *actual attainment of the object, by violence*, which is declared to constitute the treason; it is the rising *for that purpose;* and in this supposed case, nothing is found, but the assemblage and the treasonable purpose or intent. In the succeed-

ing paragraph, he repeats the same opinion.—In the next, he declares military weapons unnecessary: Then proceeds with the more particular doctrines of riots, as that the purpose must be general or universal; not private or personal. The intention he says, is the true criterion of the offence. Next comes a paragraph which has been much relied on; "The court are of opinion, that if a body of people, conspire and meditate an insurrection, to resist or oppose the execution of any statute of the United States by force, that they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution *by force*, that they are guilty of the treason of levying war: and the *quantum* of the force employed, neither lessens nor increases the crime; whether by one hundred or one thousand persons, is wholly immaterial." I understand the word *force* here, to be used in its figurative sense; that it is used as contrasted with the conspiracy or meditation of the treason; that it is used to signify the body assembled for the purpose of carrying that conspiracy into effect; hence it is, that in the concluding member of the paragraph, he speaks of the number assembled, or what he calls *the quantum of the force*, declaring it to be immaterial whether by one hundred or one thousand. In the next paragraph, he maintains the same idea, concluding that paragraph with these words, "*but it is altogether immaterial, whether the force used, is sufficient to effectuate the object; any force connected with the intention, will con-*

stitute the crime of levying war. He proceeds to state, that his opinion is in substance, the same with the opinion of the circuit court in 1795, in the case of Vigol and Mitchell. Now in the case of Vigol, 2 Dall. 347, The court give no absolute opinion; the opinion is rigidly confined to the circumstances of that case, in which, the judge states, there were acts of violence and devastation. But in the case of Mitchell, Id. 356. The Judge, Patterson, commenting on the circumstance of its not being sufficiently proven that the prisoner was at General Nevill's house, where the violence was used, speaks thus:—" He is proved by a competent number of witnesses, to have been at Couche's Fort. At Couche's Fort, the conspiracy was formed for attacking General Nevill's house, and the prisoner was actually passed on the march thither. Now in Foster 213, the very act of marching is considered as carrying the traiterous intent into effect:" In a subsequent part of his opinion, speaking of the conspicuous figure which the prisoner had made, the judge uses these explicit words. " His attendance armed at Braddock's field, would *of itself*, amount to treason, if his design was treasonable." So that if Judge Chase's opinion be as he professes, *substantially* the same, with this of Judge Patterson's, then a deed of violence is not necessary, but the assembly and treasonable intent are enough. Judge Chase sums up his opinion in these words. " If from a careful examination of the evidence, you shall be convinced that the

real object and intent of the people assembled at Bethlehem, was of a public nature, (which it certainly was, if they assembled with intent to prevent the execution of both of the abovementioned acts of congress, or either of them,) it must then be proved to your satisfaction, that the prisoner at the bar incited, encouraged, provided, or assisted in the insurrection or rising of the people at Bethlehem, and the terror they carried with them, with intent to oppose and prevent by means of intimidation and violence, the execution of both the abovementioned acts of congress or either of them; and that some force was used by some of the people assembled at Bethlehem." But for these concluding words, the opinion of the judge would have resulted merely in requiring what Mr. Wickham calls *potential force;* the last words may well be accounted for, from the particular circumstances of this case, in which there was actual violence; and I will venture to affirm, that it is the only case in which, a deed of violence ever was declared necessary, when the assemblage and the treasonable intent, could both be made out by proof, independent of any such deed. If there be another, let it be shewn. If this case stand alone, why will you make this principle an abstract and general one; since in the language of Mr. Randolph, it results from the circumstances of this particular case, and can be found in this case only. I have shewn, that in England, the distinction is clearly settled between

the *bellum levatum* and the *bellum percussum*; and that there, war may be levied, although no blow be struck; I will now show, that by the authority of a court of this country superior to that in which Judge Chase sat, it has been in substance declared, again and again, that war may be levied without battle; that the assemblage with a treasonable intent *completes* the crime of levying war: you will know, sir, that I am referring to the opinion of the supreme court, in the case of Bollman and Swartwout. In that case, page 39-40, the court commences the declaration of its opinion.

" Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

" To constitute that specific crime, for which the prisoners now before the court, have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force, the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation *by the assemblage of men for a purpose treasonable in itself*, or the fact of levying war, cannot have been committed."

Is there any requisition of force here? Is it said that the conspiracy must be brought into operation by the assemblage of men, for a purpose treasonable in itself, *and by deeds of force*

and violence, or the fact of levying war cannot have been committed? No, Sir, it is *the assemblage of men for a purpose treasonable in itself*, which *alone* is declared sufficient to make the fact of levying war. " It is not the intention of the court to say, that no individual can be guilty of this crime, who has not appeared in arms against his country. On the contrary, *if war be actually levied*, that is, *if a body of men be actually assembled for the purpose of effecting by force, a treasonable purpose*, all those who perform any part, however remote, from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be *an actual assembling of men for the treasonable purpose*, to constitute a levying of war." Here force is mentioned: but how is it mentioned? merely as the ultimate purpose of the assemblage; the means by which they intend to execute their treasonable design: So in the assemblage on the island their object was the seizure of Orleans; they intended to effect that purpose by force: there was then a body of men actually assembled; and the purpose which brought them together, and which they were going to effect by force, was a treasonable purpose, " To *complete* the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design."— Here an actual assemblage of men for the purpose of executing a treasonable design is declared to *complete* the crime of levying war: not a

word of force or deeds of violence; yet the crime is *completed.* The court profess to be enumerating the ingredients, which taken together, would make this crime; and conclude the enumeration by stating that that would *complete* it: yet it is pretended by the gentlemen on the other side, that the great ingredient of force and violence not enumerated by the court, is necessary to its completion. " In the case now before the court, a design to overturn the government of the United States in New Orleans, by force, would have been unquestionably a design, which if carried into execution, would have been treason, and the assemblage of a body of men *for the purpose* of carrying it into execution, would *amount* to levying war against the United States, but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war." Here again, the court declare, that the assemblage for the treasonable purpose, would *amount* to levying war; well, if that would amount to levying war, it required nothing else to make it amount to it; yet gentlemen persist in saying it did require something else, as deeds of violence, to make the assemblage an act of levying war, or what is bolder still, that these deeds of violence, were required by the opinion of that court. In other words, that while the court was perpetually and uniformly saying one thing, they as uniformly meant a totally different one. Let us proceed with the opinion. " If this enterprize was against Mexico, it would amount to a high

misdemeanor; if against any of the territories of the United States, or if in its progress, the subversion of the government of the United States, in any of their territories, was a mean clearly and necessarily to be employed, if such mean formed a substantive part of the plan, the *assemblage of a body of men to effect it* would be levying war against the United States."

" But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution *by an open assemblage of men* for that purpose, previous to the arrest of the prisoner, in order *to consummate* the crime as to him; and a majority of the court is of opinion, that the conversation of Mr. Swartwout affords no sufficient proof of such assembling."

We have been before told that the assemblage with the treasonable intent would *amount* to levying war, would *complete* the crime of levying war, here in variant language, but language equally as strong if not stronger—we are told that if the treasonable intent is carried into execution, how? by deeds of violence and force? No: but by an open assemblage of men for that treasonble purpose; this crime is *consummated*; not that by such assemblage the crime is in an incipient stage; not that it is advancing to maturity; but that it is *consummated.* To remove all possibility of doubt, the court then begin to consider the subject analytically. " The prisoner stated that" " Col. Burr with the support of a powerful association, extending from New-

York to New-Orleans, was levying an armed body of 7,000 men from the state of New-York and the western states and territories, with a view to carry an expedition to the Mexican territories."

"That the association, whatever may be its purpose, is not treason, has been already stated. That levying an army, may or may not, be treason, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been also stated. The mere enlisting of men, without assembling them, is not levying war. The question then, is whether this evidence proves Col. Burr to have advanced, so far in levying an army as actually *to have assembled them.*" Here again it is clear that if the case has gone so far as that the men have been assembled, the crime in the opinion of the court is complete. Proceeding with the analysis the court say: "*It cannot be necessary that the whole army should assemble*, and that the various parts which are to compose it should have combined. But it is necessary there should be an actual assemblage, and therefore this evidence should make the fact unequivocal.

"The travelling of individuals to the place of rendezvous would perhaps not be sufficient. This would be an equivocal act, and has no warlike appearance. *The meeting of particular bodies of men and their marching from places of partial to a place of general rendezvous would be such an assemblage.*

" The particular words used by Mr. Swartwout are, that Col. Burr was levying an armed body of 7,000 men. If the term levying in this place, imports that they were assembled, then such fact would amount, if the intention be against the United States, to levying war. If it barely imports that he was enlisting or engaging them in his service, the fact would not amount to levying war.

" It is, therefore, the opinion of a majority of the court, that in the case of Samuel Swartwout, there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason."— After this language so clear and unequivocal, I should feel, that I was insulting the understanding of the court, if I were to press the enquiry, whether deeds of violence are necessary to constitute the treason of levying war against the United States. So far from deeds of violence, the court does not even require the assemblage of the whole force; but expressly declare that the mere *marching of individuals from a place of partial, to a place of general rendezvous is such an assemblage*, as would amount to levying war. Our court in this case, has clearly maintained the line of demarcation acknowleged by the British courts between the *bellum levatum* and the *bellum percussum*.

Does reason, sir, any more than law, require that you should wait until the blow be struck? If so, adieu to the law of treason and to the chance of punishment. The aspiring traitor has

only to lay his plan, assemble his forces, and strike no blow till he is in such power as to defy resistance. Then what becomes of your constitution, your law of Congress or your courts? he laughs them to scorn.

But where can be the necessity of waiting for actual violence? The overt act is only required as proof of secret intention: now, although it is true, as Mr. Lee says, that hard knocks are things we can all feel, yet it is equally true, that an assemblage of men is an object we can all see; true it is, as the gentleman says, that small arms and cannons may be heard; so may the disclosure of a treasonable plot. At last, the overt act, which they require, is but an appeal to the human senses; and the overt act which we have proven, is equally satisfactory to them.

But Mr. Randolph wishes to know if enlisting be not enough, where you will draw the line short of force: the answer is obvious; *at the assemblage;* where the courts of England and the highest court of this country have concurred in drawing it.

Mr. Wickham, indeed, complains that if you stop him short of actual force, you take away the *locus penitentiæ.* I say if you do not stop short of it, you take away the motive of repentance; for you offer the traitor victory and triumph, and it is not in their arms, that we are to expect from him repentance. But was there, sir, no opportunity for repentance in this case? We shall prove that the prisoner was for more

than a year brooding over this treason. The ruin and desolation which he was about to bring upon this country must have been often before him. If all love of his country, were so far extinguished in his breast, that he could not forbear; if the downfall of liberty and the horrors of civil war gave no pang of remorse to his bosom, why for his own sake, did he not repent? Why did he not remember the treason of Cæsar and the dagger of Brutus? Why did he not remember Cromwell, as bold and daring as himself, and the miserable effects of his successful usurpation; the terrors that haunted and scourged him day and night, and blasted him even amidst the spendor of a palace. Cæsar and Cromwell, he did remember; not to detest and to repent; but to envy, to admire and to emulate. Such is the kind of remorse which he felt at the idea of drenching his country in blood and substituting despotism for liberty; such the very promising disposition and temper for repentance which alone he manifested.

Sir, it is clear that neither reason nor law require actual war, the *bellum percussum*, in order to make a levying of war.

But Mr. Wickham tells us, that if *actual force* be not necessary, *potential force* at least is necessary: and by potential force, he means intimidation. To illustrate his meaning still more distinctly, he puts this case: suppose a body of men assemble in the country in great numbers, and move into this town for the purpose of at-

tacking the capitol and seizing the public arms; the people of the town intimidated by them, stand aloof, and make no resistance; this, says he, is potential force.

To this requisition I have two answers:

First, that neither the law of England nor the supreme court of this country require any such thing. I need not repeat the authorities upon this subject. The passages which I have recently read from the decision of the supreme court are fresh upon your memory; and you know that they do not even squint at any such idea; but repeatedly declare the crime to be *completed* and *consummated* by the bare assemblage for a treasonable purpose.

My second answer to this requisition of potential force is this, that if it be necessary, and if I understand what is meant by it, it does exist in the case at bar. Let us examine what is meant by potential force. In the case put by the gentleman of a multitude marching to attack the capitol and the people of the town standing off in apprehension and alarm; what is the force which operates? not hard knocks, confessedly; but the excitement of fear and apprehension. Suppose, however, that the town people instead of being frightened into submission, had been excited by apprehensions for their capitol and themselves to take arms in their defence; the same affection of the mind would still be in operation, although in a different degree; it would still be apprehension for their safety, which would urge them to their

defence; in this case, the approaching body, although not successful, has had its effect; it has compelled the town to arm in opposition to it; would not this be completely the exertion of potential force; would not the town have been forced to its defence; and as the force which produced that effect was not *actual*, must it not have been *potential?* Suppose in this case, the town thus compelled to arm in its defence should march out to meet the approaching body; should rout them, without a blow on either side, and should seize and destroy their baggage waggons: I ask whether this approaching body, formed of citizens, would not be traitors? My reason and judgment tell me that the force then acting on the inhabitants of the town, the alarm which made them fly to arms, *is potential force;* and that those who had exerted this species of force upon the town, would be traitors even according to Mr. Wickman's conception.

I ask then, whether the assemblage on Blennerhassett's island did not exert this species of potential force on the surrounding country?—What was it that urged the state government of Ohio, to send a body of men to take this party and seize their boats? It was a well founded alarm and apprehension of the objects of this assemblage. What was it that caused the militia of Wood county to be put in motion and marched to the island? The same mental affection, the same potential force, the same alarm and apprehension which had acted on the go-

yernment of Ohio? What was it, when this assemblage fled from the island and advanced down the river, gathering, like a snow ball on the side of a mountain, magnitude and momentum as it rolled along, what was it that threw the City of New-Orleans into dismay and consternation, and produced the movement of the American army in that quarter for its defence? Sir this terror and alarm arose from the designs of the prisoner and his party: designs which we shall prove upon them, if permitted. And contemptible in point of numbers, as the party under Aaron Burr may appear, it will be shewn to you, Sir, that the United States had not a garrison on the river, nor in New-Orleans in the *then* temper of that City, capable of resisting the designs of the prisoner. These are facts which will be in proof, if the evidence shall go on: and farthermore, if the accused and his party may be believed, that he had men engaged, and prepared to join him at the motion of his finger in sufficient force to have given battle, and in a better cause, successful battle, to the whole army in the south. This threatened power did not indeed rise and shew itself; the unexpected vigor of the government, and the equally unexpected virtue and indignation of the country, awed them into silence and kept them down. Upon the whole, Sir, if potential force be required, we shall prove it in this case: and I believe it is by this time too apparent that the assemblage on the island had every character and property which either law or rea-

son require to constitute an overt act of levying war.

But let me suppose that you shall think otherwise; to whom does it belong to decide whether there has been an overt act or not? What did you yourself decide the other day upon this subject?

" Levying of war, is a fact, which must be decided by the jury. The court may give general instructions on this, as on any other question brought before them, but the jury must decide upon it as compounded of fact and law.—Two assemblages of men not unlike in appearance, possibly may be, the one treasonable, and the other innocent. If, therefore, the fact exhibited to the court and jury, should, in the opinion of the court, not amount to the act of levying war, the court could not stop the prosecution—but must permit the counsel for the United States to proceed to show the intention of the fact, in order to enable the jury to decide upon the fact, coupled with the intention."

In strict unison with this opinion is the English law. 1 Hale, P. C. 1 East 67. This court then having itself decided that the question whether there has been an overt act or not, belongs exclusively to the jury, it is strange that the prisoner should persist in pressing it on the court. What does he mean by it? Such an anxious perseverance in this course, certainly implies a reflection either on the jury or the court; it implies his belief either that the jury

will not do him justice, or that the court will do him more than justice; if he believed that the jury would do him justice, and wished nothing more, he would be content to leave his case to the jury: if he believed the jury would not do him justice, and he therefore tries to force his cause before the court, whether they will or no, I may truly say that he exhibits a phœnomenon unprecedented upon this earth; a man flying from a jury of his peers to take refuge under the wings of the court. Sir, I can never think so illy of my countrymen as to believe that innocence need to fly from them. Nor will my respect for this court suffer me to apprehend for a moment, that any consideration will induce them to invade the peculiar and acknowledged province of the jury. Sir, I believe that my respect for this court, personally and officially, is too well known, to apprehend that remarks of a general nature, will be applied to them. But if, at this period, when the intellectual power and illumination of the bench is so universally admitted, a precedent be set, by which the great facts in a trial for life and death, shall be wrested from the jury, and decided by the bench ——— what use may not be made of it hereafter!—In the fluctuations of party—in the bitterness and rancour of political animosity—some tyrant Bromley, or some ruffian Jeffries may mount the bench!—Can the soul look forward, without horror, to the dark and bloody deeds of death, which he might perpetrate, armed with such a precedent as you are now

called on to set. But you will not set it, Sir. You will not bring your country to see an hour so fearful and perilous, as that which shall witness the ruin of the trial by jury. I shudder to reflect what might be the consequences of such an hour.

I have finished what I had to say, Sir: I thank the court for its patient and polite attention. I am too much exhausted to recapitulate, and to such a court as this, I am sure it is unnecessary.

Argument on the motion to commit Aaron Burr, Herman Blennerhassett, and Israel Smith, for trial in Kentucky.

I SHALL have great need of your patience, Sir. The subject comes to me so beaten and exhausted, that I feel the impossibility of my advancing any thing new upon it. Our spirits too, are all exhausted, and nothing but the great patience of which the court has given such constant and obliging proofs, could support me through the argument. In the course of the discussion, however, on which my duty forces me, it is not impossible but that some hint may be started, or rather revived in a different shape, which the superior mind of the bench will pursue to advantage.

The counsel in the defence, have rendered it fashionable, in arguing this motion, to give a passing blow to the question of *autre fois acquit:* they continue to press upon the court, with sufficient importunity, their doctrine that the acquittal of Aaron Burr, of high treason by the petit jury, is a bar to a trial of him any where else. This question having been already solemnly argued, and the court having waved a decision upon it, as too important to be settled by a single Judge, I feel very unwilling to follow the example which has been set me. But Mr. Wickham seems to have condensed all the arguments in favor of the doctrine, into a very

small compass, and I thought the court appeared struck with the force of that condensation.—Give me leave, therefore, to make a few observations upon it.

The doctrine, if true, applies only to Aaron Burr; it does not affect the other persons accused, for they have been acquitted of nothing; and as to Aaron Burr himself, it applies only to that branch of this motion, which seeks to commit him for high treason; the other branch of it which goes to his commitment for the misdemeanor, remains totally unaffected by it: for it is not pretended that the failure to prove him guilty of making preparations in Virginia, against Spain, constitutes any bar to a trial for preparations made *in any other State*. He would be still liable to commitment, therefore, on this branch of the motion, although the court should think the motion to commit him for treason, barred by his former acquittal.

But let us examine Mr. Wickham's condensed argument, to prove the acquittal for treason, a bar. "Levying war against the United States," says he, "is *is an entire thing:* it has no locality: and therefore one acquittal is an entire acquittal; and an acquittal in one place, is an acquittal in every other." It is true, that when we speak or write of levying war against the United States, in the abtract, we do mean an entire thing, and it has no locality: but when we select a particular act of levying war, as the subject of a criminal prosecution, we give to this abstract and erratic crime "a local habita-

tion" as well as "a name:" we prescribe to ourselves, limits and boundaries, which we cannot pass in the evidence. So the constitution when it defines treason as consisting in levying war against the United States, contemplates an entire offence; for it is giving a definition, which like all definitions must be general and abstracted: but the same constitution when it descends to the prosecution, proceeds to say, that no man shall be convicted of treason without an overt act; and it secures to the accused the right to a trial by jury, in that district in which the offence is charged to have been committed. Hence in the indictment, it is not sufficient to charge the defendant with levying war against the United States *generally:* we are compelled to set out the particular overt act on which we rely for his conviction; and we are farther compelled to designate, in the indictment, the place in which that overt act has been committed. Nor is this all. The proof must correspond with the allegations of the indictment. We are compelled to prove the particular overt act which is charged, and to prove it to have been committed in the place which is charged. Thus restricted on the trial, in the first instance to one act, which is only one, and perhaps a very minute link in the great and entire chain of the treason, how can this link be called the entire treason: and restricted on the trial, to a particular place, how can it be said that there is no locality in the case: more especially how can those gentlemen advance the doctrine who

were contending all along in the trial for treason, that we should be bound down to Blennerhassett's island, and the especial act of treason laid to have been committed there. Sir, if the subject then under trial, had been an entire offence against the United States, without locality, we might have given proof of any act, any where within the United States, or out of them: for to have restricted us in the proof to the United States even, would have been, so far, to render the offence local. The fetters of locality removed, we should have been at large in the proof: the world would have been before us.—How different was the case: how justly different was it: for to say that there is no locality on a trial for treason in levying war is in flat contradiction to all the authorities, as well as to reason. Your notes from the arguments of the gentlemen themselves, will furnish you with abundant references in disproof of their present position: I will read one only, which I do not observe to have been among their authorities: it is Kelyng 15, being one of the resolutions of the court of King's Bench, on Sir H. Vane's case. "It was resolved, that in this case, the treason laid in the indictment, being the compassing of the king's death, which was in the county of Middlesex, and the levying war being laid only as one of the overt acts, to prove the compassing of the king's death, though this levying the war be laid in the indictment to be in Middlesex, yet a war levied by him in Surry, might be given in evidence; *for being not laid as the trea-*

son but only as the overt act to prove the compassing, it is a transitory thing which may be proved in another county. But if an indictment be for levying war, and that made the treason, for which the party is indicted, in that case it is local, and must be laid in the county where in truth it was." Sir, it is because of this restriction of the evidence to the charge in the indictment, that Hawkins, b. II. C. 35, sec. 3, lays down the doctrine formerly read, that an acquittal of a murder in one county, is no bar to a trial for the same murder in another county. Is not this the doctrine of reason, as well as of law? May not a man who has done no crime in Virginia, have drenched the fields of Kentucky with the blood of his fellow citizens? And may not and ought not such a man, although acquitted in Virginia where he has done nothing, to be tried and convicted in Kentucky, where he has perpetrated a heinous crime? We might as well be told, that a man being acquitted of stealing a a horse in Virginia, proves that he has not stolen one in Kentucky; and would exempt him from being tried for that crime there. *Practically* there is no difference in principle, between the cases: no difference can be discovered except in the visionary idea, borrowed from the regions of abstraction, that levying war against the United States, is an entire thing, and has no locality: an idea exploded in practice, exploded by reason as well as law; an idea against which the gentlemen themselves, were found in battle array, upon actual experiment,

however convenient they may find it to contend for it now, on theoretic and speculative grounds.

After so much as has been formerly said upon this subject, I shall trouble you upon it no farther. I proceed to the enquiry more immediately before you.

This motion, Sir, is made under the 33rd section of the Judicial act, which authorizes you to commit for offences done in another state, and convey the offender to such state for trial. The charges against the three persons at your bar, are

First. Treason against the United States, in levying war against them; and

Secondly. Misdemeanor in beginning or setting on foot an expedition against the territories of the king of Spain, a prince with whom we were at peace, against the act of congress in that case made and provided.

According to the general rule, *probable* cause would be sufficient to sustain this motion. But I admit the distinction between a motion made shortly after the commission of the offence, when little or no time has occurred, to collect the proof, and one made at a remote period, when there may have been sufficient time and opportunity to collect all, or a great part of the proof: in the former case, the court will be satisfied with slight probability; in the latter, the probability should be much stronger. I admit the application of this distinction to the case at bar, and that here the court ought not to com-

mit, unless the probability be strong. But still I apprehend that the court will not demand that the proof should be as full and conclusive, as ought to satisfy the conscience of a jury. 1st: Because you have not heard all the proof which would be before the jury on a final trial; the important affidavits of Stoddart, Jackson, and Glover, filed in this case, have been refused to be heard by the court on this motion, although the sole object of the enquiry here, is to ascertain what the evidence will probably be on the trial before the jury. It is true, that if you rely upon the truth of all the evidence which you have heard, and take the declarations of Blennerhassett and the party as evidence against Burr, the transaction, as the attorney has said, wears the same character now which it will wear on the final trial. But if you doubt the evidence of any witness, whom you have heard, for instance, Dunbaugh, you ought not now to consider the case as being before you on all the proof; because the rejected evidence of Jackson, supports him in one of those strong points, in which, the magnanimity of Colonel Burr's character has been deemed sufficient to refute him: or if you doubt Eaton, you ought not to consider the case as before you on all the evidence; for Stoddart is in strong corroboration of him: nor if you doubt the propriety of receiving the declarations of Blennerhassett against Burr, ought you so to consider the case, because the discarded testimony of Glover, goes to identify those parties together by proving the strict co-

incidence of their objects, and of the means by which they were to be effected. 2d. You ought not now to demand full and conclusive proof of the guilt of the accused, because by doing so, you would change the legal nature of this motion, which requires only probable cause; you would pass from the character of an examining Judge, into that of a juror, deciding in the last resort. Yet I do not mean to retract the admission, that the probability, which we are now bound to shew, must not be a slight, but a strong probability.

That the accused were with an assemblage of eighty or an hundred men, citizens of the United States, at the mouth of Cumberland, in Kentucky, and that they were among the principal or leading characters of that assemblage, seems not to be controverted: or, if controverted, has been clearly and amply proven.

Hereupon two questions arise,

First. Was that assemblage, a levying of war against the United States?

Second. Was it a preparation against the provinces of Spain, then and now at peace with the United States?

To these two questions, it was to have been desired, that we might have confined ourselves. The Attorney for the United States, who spoke first, in support of this motion, has done so. But the counsel in the defence, have taken a much wider range. They have launched into invectives against the administration, and have accused them of pursuing Aaron

Burr, with a vindictive and merciless spirit of persecution: of violating the consitution and prostituting the public treasury to the reptile purposes of envy, malice, and poor revenge.—From the administration, they have passed to General Wilkinson, and in the warmth of animadversion, have applied epithets to him, not perfectly consistent with their usual habits of decorum. Judging by the space which these several topics have occupied in their speeches, a stranger would conclude, that their principal object, was to hunt down the administration; their second, to immolate the fame and fortune of Wilkinson: their third, last and least, to exculpate their clients. This course was to have been foreseen, Sir. It has been their constant course. Every campaign which they have made during this long-protracted forensic war; every action, nay every skirmish has been projected precisely on the same plan. I will not say as Benningsen is reported to have said of Bonaparte, that this dull uniformity and monotony of design, argues penury of genius: the gentlemen have shewn sufficient fertility in raising objections to our evidence; a labyrinth, a thicket of briers has started at their *fiat* on every occasion. Nor do I believe that their phillippics against the administration have proceeded from political animosity. Two of the gentlemen are decidedly favorable to the administration. One of them in the warmth of his zeal, has exclaimed, that " as to destroying the po-

pularity of the President, he would as soon think of plucking the moon from her sphere." [Happy emblem of human favor! save that "man's faded glory, no change can renew."] A third gentleman, has so long and so prudently, and so happily maintained the elegant neutrality of the Roman Atticus, that it is not to be presumed he would seek the first professional cover which presented itself, to betray and gratify any secreet and unsuspected hostility of purpose. And as to Mr. Martin —— he has too much of the milk of human kindness in him, to feel malice or rancour towards any one. But really, Sir, if this gentleman had had a private pique against any member of the administration —— or if he had predicted "that Burr would sever the Union, and erect a seperate Empire in the West," and the vigilance and energy of the government, had blasted his prophetic credit —— or if he had been associated in the project, and had had the office of Lord Chief Justice of the Mexican empire, staked upon its success, or even if all these incentives had combined to fire him, he could not have inveighed with more apparent enjoyment against the administration, than he has done upon this occasion. One day was not enough: the repast was too exquisite to be so soon abandoned: so we had him up, a second day—and not yet contented, 'he rose again on the third day:' in this at least, imitating a brighter example. Sir, those who censure the conduct of the administration on this occasion, would have been satisfied with no course of

conduct whatever. It is proved by their contradictory charges, that they are determined to censure at all events; in one breath the government is reproached with imbecility; in the next with energy: at one moment, gentlemen find fault with the President because he did not insert the charge of treason in his proclamation of November; at the next, he is vehemently abused, because in reply to a call of the house of representatives, he did insert the charge of treason in his message, poisoning, thereby, they complain, the public mind against *their honorable client*. Sir, if administration had permitted this peaceable, agricultural scheme, the settlement of the Ouchita, "this plan so full of honor to Colonel Burr, and to his country," to have gone on without interruption, as gentlemen say they should have done, they would have been reproached, and justly too, with the ruin of this country: But having shewn in opposition to the opinion of Aaron Burr, that there was an energy in the government to be dreaded, having interposed vigorously, defeated the project and done their duty, in giving up the offenders to the laws of their country, they are now reproached as tyrants and persecutors. It is certainly true, that human nature is in all ages, the same — Give me leave to read to you, the eloquent exclamation of a Roman Consul, engaged in crushing a treason against the liberties of his country. "Wretched is the situation attending, not only the government, but the preservation of a state! Now should Cataline, watched and

weakened by my cares, my counsels and at my peril, be suddenly alarmed, change his resolution, abandon his party, give up his hostile designs and alter his career of guilt and war, into that of flight and banishment, then it will be said that he was not stript by me of every weapon of insolence; astonished and confounded, or driven from all his hopes into despair; but an uncondemned, an unoffending exile, banished by the power and the threats of a consul.—Should the conduct of Cataline, be such, as I describe, some would represent him, not as mischevious but miserable, and me not as a careful consul, but an unrelenting tyrant. Little, O! Romans, does it affect me, that all the storm of this groundless and bitter malice, should break on my head, provided, that I can shelter you from the tempest of this dreadful, this unnatural war. Be it so, that he was driven out by me, so he but goes into banishment; but believe me, he will not go: though I shall never pray to the immortal Gods, that to take some part of the blame from me, you may hear that Cataline is at the head of a hostile army, and spreading desolation with his sword, yet this you must hear: and then my greatest fear is, that the time may come, when I shall be reproached, not for forcing him to fly, but for suffering him to depart." How close is the parallel! The first part of it has been already accomplished: May Heaven avert from us, the fulfilment of the sequel! It sounds prophetically; yet there is this consolation, that its defeat rests in a great mea-

sure, with this honorable court.—I return to the question.

1. Was the assemblage at the mouth of Cumberland a levying of war against the United States?

This involves two minor questions.

1. Was that assemblage in a warlike posture?

2. Was it destined against the United States?

1. Was the assemblage in a warlike posture? What a warlike posture is, might have afforded scope for much discussion, had not this court with prudent foresight, on a former occasion, defined it. "It is apparent", said the court, "that Judge Foster here alludes to an assemblage in force, or as Lord Hale terms it, "*in a warlike posture*," that is, *in a condition to attempt or proceed upon the treason which had been contemplated.*" To ascertain then, whether the assemblage, at the mouth of Cumberland, was in a warlike posture, we have only to enquire whether they were in a condition to attempt the object which they had in view. We say their first object, was the seizure of Orleans. Were they in a condition to attempt this object? Whether they were or not, depends on a comparison of their strength, with any resistance which they would have to encounter. They were from 75 to 100 men: they had forty muskets and bayonets—they had besides a quantity of rifles, swords, blunderbusses, fusils and pistols, so as to have armed the whole

body. We learn from the witnesses, that there was no fort or garrison on the rivers from Cumberland to New-Orleans, which had sufficient power to have arrested the passage of a body so armed, accoutred and appointed: and as to New-Orleans itself, we are told, that such was the division of sentiment within it, and such the strength of the party favorable to the views of Aaron Burr, that he might have entered it, in triumph, without striking a blow. Mr. Martin has declared, with great emotion, that this is a vile calumny, on the City of New-Orleans.—This gentleman's sensibility, appears to me to act by involuntary and spasmodic starts, and to have very little connexion with his judgment. Speaking to one federal judge, of another, he has no hesitation of accusing that other, and that not by insinuation, but flatly and directly with forgery; and speaking of the administration of his country, he has as little difficulty in charging them in the face of that country, and of the world, with subornation of perjury, and with all the lowest and vilest passions, which can disfigure the human character: but if you drop the most distant insinuation against the fidelity of the City of New-Orleans, which his honorable friend himself declared to General Eaton, to be well affected to him, and much more if you touch the character of that honorable friend, nay if you touch the hem of his garment, the gentleman's nerves are immediately in a state of convulsion. If I may borrow a sentiment, "his sympathy seems to rise in pro-

portion to the guilt of its object". As to New-Orleans, I know nothing of it, personally. But from a description, which I have lately seen of it, I am not at all surprized at the statement which we have heard of its affections. Its original inhabitants, are chiefly foreigners—their language, manners, and customs, foreign—they have been habituated to a regal government, until the pomp and state of a royal satrap, and even the rank curb of monarchy, are essential, not only to their peace, but to their happiness; and upon this original ground-work, has been superinduced a new and motly population, consisting of adventurers for fortune, of every colour and from every country, and bringing with them, perhaps not only desperation, but habits of insurrection and revolution. Among others, France, Ireland, and St. Domingo, we are told, have in their various eruptions, contributed to people it, and cast from their laboring bosoms into that city, the materials of future volcances. When I allude to Ireland, let it not be supposed to proceed from disrespect to her, or the spirited efforts which she has made at emancipation. I venerate the noble cause in which she has struggled. I revere the country. I believe that the kings of England, will one day have to render a heavy and dreadful account, for having so long trodden and ground into the dust, the spirit of one of the most generous nations upon earth: a nation, from the remotest antiquity, of bards, and heroes, patriots and statesmen, orators and poets: the fair nursery of science of

very description, and genius of every hue.—But yet, Sir, it is certain that men who have been, all their lives, tossing upon the troubled sea of revolution, and before whose eyes, the meteors of insurrection and war have been dancing, almost ever since their eyes were opened, will have less aversion, less horror at such scenes, than if they had been accustomed only to peace and order: nay, Sir, it would not be wonderful, if to men of such habits, peace and order should seem dull and insipid, and the vivacity and agitation of a revolution far more interesting and delightful. Could it be matter of surprize, if such a combination of causes, motives, and incentives—the tendency to relapse into regal habits—the strong attraction of the neighbouring mines—the glare and glitter of Mr. Burr's name—the novelty and brilliancy of a crusade into Mexico—" and the prospect of plunder"—acting on a population so varied and heterogeneous, unsettled and fermenting, should have brought together, a party strong enough to put down all opposition, and welcome this courtly and enterprizing adventurer, with open arms. Whatever may have been the causes, we are assured, that such was the fact. It is not merely on the statement of Burr to General Eaton, that we are required to believe it: we have the authority of two gentlemen whose situation gave them the best opportunities of observing the temper of that City—whose judgment qualified them for that office, and whose characters for veracity and integrity, are above suspicion:—

one of them, is Mr. Dinsmoor: a gentleman of such merit, as to have extorted a panegyric even from Mr. Martin, (the more precious, because panegyrics from that gentleman, are rare to any one except his honorable friend and his associates)—the other is Commodore Shaw, whose frank and candid manner, and open and honest face, are a panegyric from the hand of Heaven itself. If you believe these witnesses, the assemblage at the mouth of Cumberland, was in a condition, not only *to attempt*, but *to effect* the object which they had in view, if their object was the seizure of the City of Orleans, as I shall hereafter prove it to have been.

But it is contended on the part of the defence, that although the object should be a treasonable one, and the assemblage in a warlike posture, still this would not amount to levying war, for says Mr. Wickham, war cannot be levied without the application of actual force; and Mr. Martin, presenting the same position in different language, affirms that there can be no levying of war, without a breach of the peace.

What will amount to levying war, has been already elaborately argued from the bar, and solemnly decided by this bench. Instead, therefore, of re-assembling the British authorities, and those of this country, to disprove the gentlemen's requisition of violence and actual force, I beg leave to read a few paragraphs from the opinion of this court, on the motion to arrest the evidence in the trial for treason. You cit-

ed 1. Hale, 149-6. " If there be a war levied as is above declared, viz. an assembly arrayed in a warlike manner, *and so in the posture of war for any treasonable attempt*, it is *bellum levatum*, although not *percussum*." You cited also Foster—" An assembly armed and arrayed in a warlike manner, for a treasonable purpose, is *bellum levatum* though not *bellum percussum. Listing and marching, are sufficient overt acts without coming to a battle or action.*"—In the same decision you say—" The opinions of the best elementary writers, concur in declaring, that where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, *the assemblage* is an act of levying war. These opinions are contradicted by no adjudged case, and are supported by Vaughan's case. This court is not inclined to controvert them."—As to Vaughan's case, this court in another part of the same opinion, makes this extract from it.—" The words used by the Chief Justice are, " when men form themselves into a body, and march rank and file, with weapons offensive and defensive, this is levying of war with open force, if the design be public." Mr. Phipps, the counsel for the prisoner, afterwards observed, " Intending to levy war, is not treason, unless a war be actually levied." To this the Chief Justice answered, " Is it not actually levying of war if they actually provide arms and levy men, and in a warlike manner, set out and cruize and come with a design to destroy our ships ?"

Mr. Phipps still insisted, " it would not be an actual levying of war, unless they committed some act of hostility." " Yes, indeed, said the Chief Justice, the going on board, and being in a posture to attack the king's ships." Mr. Baron Powis, added, " but for you to say, that because they did not actually fight, it is not a levying of war, is it not plain, what they did intend? That they came with that intention, that they came in that posture, that they came armed and had guns and blunderbusses, and surrounded the ship twice; they came with an armed force, that is a strong evidence of the design." Immediately on this quotation, you add— " The point insisted on by counsel in the case " of Vaughan, *as in this case*, was, that war " could not be levied, without actual fighting. " *In this the counsel was very properly over-* " *ruled.*"—The counsel in this case are however still more importunate than Mr. Phipps was in the case of Vaughan. For after being overruled in this requsition of actual violence, after having the point closed against them, by a solemn adjudication—they again revive the same question before the same tribunal, which had just decided it, and they press upon you the necessity of a contrary decision, without offering one additional argument or authority, or shedding one new ray of light upon the subject, from any source whatever. You had in another part of the same opinion, expressly put a case to shew actual violence unnecessary. " If a rebel army, avowing its hos-

tility to the sovereign powers should front that of the government, should march and countermarch before it, should manœuvre in its face, and should then disperse from any cause whatever, *without firing a gun*, I confess, I could not without some surprize, hear gentlemen seriously contend, that this could not amount to an act of levying war." This surprize, however, notwithstanding the warning, gentlemen have resolutely administered to you; though after such an admonition, they could scarcely have expected that it would be an agreeable surprize.

Mr. Martin, with an appearance of confiding very much in it, has put this case—" If an army should assemble in a forest, in full force, completely equipped for war, and should avow their object to be the seizure of the City of Orleans, nay if they should march within a mile of the City, and then disperse without striking a blow, it would not amount to levying of war, " for there would be no war levied, except against the birds and beasts." It is obvious, that this is the same objection in a different shape; the conclusion which he draws from his case, is still founded on the idea, that actual violence is necessary. Sir, we have seen that according to all the authorities, English and American, an assemblage in a warlike posture, and avowing a treasonable purpose, is levying war: but according to Mr. Martin, ten thousand men, horse and foot, with artillery and musketry—with guns, trumpets, colours flying, and all

the pomp and pageantry of war, and with an avowed design to seize and hold by force, a city of the United States, is not treason—provided the assemblage be in a forest; nay, if they march two thousand miles towards their purpose, with all the insignia of war, and halt within a mile of their object, there has been no treason committed—provided their march be through a forest. I know, Sir, that ancient superstition attached some very sacred sentiments to groves and forests. They were the haunt and residence of the British druids; and it is amid the solitary gloom of woods and wilds, that Lady Randolph courts an interview with the spirit of her Douglass: But I acknowledge that I did not expect to hear this poetic idea, pressed so far, in these times, and in a serious debate. The case put by Mr. Martin, is within every definition of levying war, for there is every thing but a battle, which all the books and this honorable court unite in declaring unnecessary:—But in his case, there is an *armed assembly*—an *assembly in force—with military array and warlike weapons—an assembly in a warlike posture—an assembly in a condition not merely to attempt, but to execute their design—avowing too, that design to be treasonable:*—yet the sacred forest, it seems, purges away the guilt of the treason, and reduces the offence even below a riot. If Mr. Martin means by this forest scenery, that the whole movement being in secret, there is no public intimidation, and therefore no treason, I answer firstly, that

no exposition of levying war, which we have yet seen, either from the English or American benches, has declared intimidation a necessary ingredient in that crime.

Secondly, that the assemblage here was not secret: it was in the face of day and on the Ohio, the public high-way, which led directly to their object; and

Thirdly, if intimidation were a necessary ingredient in the treason of levying war, I have shewn it on a former occasion to have existed in the case at bar—in the operations of the government of Ohio—the seizure of the boats at Marietta—the marching of the Wood militia—and the rapid movement of the American army from the Sabine to New-Orleans.—But Mr. Martin has strenuously contended, that his forest army would merely come up to the legal definition of *an unlawful assembly*.—I confess, Sir, that I heard this position, with surprize and regret.—From the very eminent station, which that gentleman has so long held at the American bar,—I had hailed his arrival among us, as one of the most fortunate events of my life—and day after day, week after week, and month after month, I have been watching with all the anxiety, and all the perseverance of an astronimical enthusiast, for the happy moment, when we should mark the orb of his genius, emerging from our horizon, and ascending aloft, in the light and blaze of its own glory. But I have watched in vain. That happy moment has not yet come: for although the gentleman has been with us for three or four

moons, it has never been our good fortune to catch him in one of his legal phases. The position which we are now considering, is monstrous in the extreme: An army in full force—with all the array of war, and avowing a treasonable object, is merely an unlawful assembly, provided their operations be in a forest. Now I had always thought, ever since I read Blackstone's Commentaries, that *riots*, *routs* and *unlawful assemblies*, were three stages of the same offence: *the unlawful assembly*, being the inception—as where three or more assemble to do an unlawful thing (to pull down a hedge for instance, or to attack and destroy a particular brothel) but where they disperse without making any movement towards it:—that the *rout* was where an unlawful assembly on a common quarrel does make some movement towards their purpose, but stop short of it; and *the riot* where they not only make a movement towards their purpose, but carry it completely into effect:—So that in technical language, that was *an unlawful assembly*, whose purpose if accomplished, would constitute *a riot*:—Such, as every novice in the law knows, is the language of 4 Blackstone, 146. Let us apply those rules to Mr. Martin's case:—His army in the forest is *an unlawful assembly*:—Very well:—When they move towards their purpose, as by marching within a mile of Orleans, they constitute, I suppose, *a rout*:—and if, instead of desisting, they carry their purpose completely into effect; that is, if they take the City of Orleans by storm, and hold it against the authority of

the United States ;—*it is a riot.* This may be law in Maryland ; and if it be so, I congratulate my native state, on the mildness of the criminal code under which it has flourished for thirty years, during the administration of Mr. Martin,* and flourished too, so far as I am informed, as free from legal stain, as those states which have been held with a tighter rein. In Virginia, however, and in England, nothing is more clear than these two principles ; that if the purpose consummated, would make *a riot* merely, the assemblage for that purpose, is merely *an unlawful assembly ;* but if the purpose consummated, would be *treason in making war*, the assemblage for that purpose in a warlike posture, would be *treason in levying it.* And tested by these principles, which are so clearly laid down in the authorities just reviewed, the army in the forest, instead of being simply *an unlawful assembly*, is indisputably a *traiterous* one.

The gentlemen have insisted much on the circumstance, that there was no violence, no rudeness at the mouth of Cumberland ; but that all there, was gentleness, peace and civility. This is still the same idea: it is still a requisition of actual force and violence. They have not yet shewn this to be necessary to constitute treason: but the reverse has been shewn as clearly as authority can shew any thing. And surely no

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* *This gentleman had repeatedly mentioned that he had been for* 30 *years Attorney General of that State.*

lawyer who values his reputation, would hazard the opinion, that a quarrel between Burr's party and any of the neighbouring inhabitants, about the price of provisions, for instance; or even a breach of the peace, by an affray, between them, in such a quarrel, would have affected in any manner, the treasonable character of that assemblage.—Mr. Martin has asked, whether if a man purchases powder for the purpose of blowing up or burning a dwelling house, but repents and desists from it, you can convict him of arson: or whether if he purchases arsenic to poison a man, but forbears to do it, you could punish him for murder? Certainly not; for arson does not consist in purchasing powder: nor murder in procuring arsenic: but if from these premises, he would deduce the conclusion that levying war does not consist in an assemblage in a warlike posture, for a treasonable purpose, his deduction is most palpably a *nonsequitur*.—The gentleman implies, by this process of reasoning, that there is so strict an analogy between the crimes of arson and murder, and that of treason in levying war, that any inference drawn from the former, applies with equal force and propriety to the latter. Let us see then in what levying war would consist, according to this course of argument. And by way of simplifying the investigation, let us try the analogy with murder.—Murder is the killing a man with malice prepense. The administration of the arsenic, although it produce the most terrible effects.

is nevertheless not murder, unless it produce the death of the subject. The crime is not committed unless the design of the offender be perfectly accomplished: if any thing be left unfinished—if the success be not complete—if it stop short of the meditated purpose, even by a hair's-breadth, the offence is not committed at all. Now if the parallel between murder and treason, be as close and perfect, as Mr. Martin's argument insinuates, then levying war, would not indeed consist in an assemblage in a warlike posture, with a treasonable intent; nor would a battle make the crime, because the battle may fail of success, as in the case of intended murder, the arsenic may fail of success: it is only then when the battle succeeds, when the traitor has triumphed over the liberties of his country, and is no longer within the reach of punishment, that he has incurred the guilt of treason. Such are the absurd consequences which flow from the attempt to force analogies between crimes so dissimilar in their nature.

If I do not deceive myself, Sir, it may now be assumed as proven, that the assemblage at the mouth of Cumberland, was an assemblage in a warlike posture; that is in a condition to attempt or proceed upon the treason which was contemplated. I admit, however, that in order to complete the offence, we are bound to shew that their design was treasonable. This brings me to the enquiry, 2. Was this assemblage destined against the Union?

If it contemplated what is called a central revolution, or if it contemplated a forcible seperation of the Western States, it is understood to be admitted, that the intention was treasonable. So, also, if it contemplated a violent seizure, and permanent detention of the City of New-Orleans, against the authority of the United States, it is also understood to be admitted, that the design was treasonable.

But if no actual violence was to be used, to obtain possession of the City; or, if the object was to hold the City for a short time, and use it merely as a theatre of preparation against Mexico, it is understood to be contended, that the design was not treasonable. Let us examine these positions separately.

1. If no actual force was intended to be used to obtain possession of the City, the design was not treasonable. To ascertain the truth of this idea, let us examine what it is that makes the holding of a fort or castle, against the king, treason: is it the force with which it was taken? It is not: for if a person having the custody of a castle or fort deliver it up to the rebels or enemies by treachery, or in combination with them, it is treason: Foster 219. This case meets the objection directly: for if the stronger party of the people in New-Orleans, having the custody of that town, and bound by their allegiance to protect the government of the United States within it, had by treachery or in combination with Aaron Burr, delivered it up to him, without a blow, it would, according to this authori-

ty have been treason in them all, in levying war. It is not then the force which is used to take the fort or castle, which makes the treason. Is it the force which is used to defend it, which constitutes that crime? Foster, ibid. says it is not: for if a man in confederacy with rebels, shut the gate of a castle, and without any use of weapons, offensive or defensive, or any acts of violence from within, hold it against the royal authority, it is high treason in levying war.— It is not then either actual violence in taking possession, nor deeds of violence in retaining it that constitutes the treason. It is obvious that the crime consists in the expulsion and exclusion of the regal authority and the setting up within the limits of his territory, an authority totally independent and subversive of his. It is immaterial therefore whether the City of New-Orleans was to be taken or detained by deeds of violence; it is enough if the prisoners meant to take and hold that City in exclusion and defiance of the authority of the United States.

2. The second objection is, that if the object was to hold the City but for a short time, and use it as the theatre of preparation against Mexico, it would not be treason. To this I answer, that if the crime consists in the expulsion and exclusion of the regular authority of the country, it must commence with the moment of that expulsion. And I take it to be clear law, that if one of the king's castles in the hands of his subjects, refuses to surrender and open its gates on a summons from him, the crime of treason is,

eo instanti, complete, and a bill might be found for it the next moment. Besides, Sir, I take it that this question has been already decided by the supreme court, in the case of Bollman and Swartwout: for there it is said, that if Orleans were to be taken and revolutionized, (which it certainly would be by the introduction of a new authority, superseding that of the United States,) "although it were merely as a step to, or a "mean of executing some greater projects, the "design was unquestionably treasonable; and "any assemblage of men for that purpose, "would amount to levying war." On authority and reason therefore, I consider it as immaterial whether Orleans, was to be taken and held with or without a battle; whether it was to be holden for a long or short time; whether it was the ultimate object, or merely a step to grander enterprizes.

This branch of the dicussion is *ex abundanti cautela;* for I think I shall shew, that if a battle was necessary to get possession of New-Orleans, a battle was intended to have been fought; and that there was no design to relinquish that City after having once obtained it.

Let us now proceed with the enquiry, what was the design of this assemblage: and let us collect that design.

1. From transactions on the spot.
2. From extrinsic circumstances.

1. From transactions on the spot. What were those transactions? Boats from the mouth of Beaver, and from the Falls of the Ohio, carrying men from Pennsylvania, Virginia, Ken-

tucky, and perhaps the state of Ohio, and amongst others, carrying Blennerhassett and Smith, two of the accused, rendezvous at the mouth of Cumberland river in Kentucky. They go to meet their acknowledged chief and leader, Aaron Burr—to place themselves under his immediate command, and to receive farther disclosures of his plan. Some of these men are proven to have been on the pay twelve and an half dollars per month—and in addition thereto, a bounty of one hundred acres of land:—to have engaged on these terms in an undefined service for six months—a service, in which, they knew there was perhaps to be fighting—and some of them knew at least, that they were to take New-Orleans in the way—aware at the same time, that New-Orleans, was not in the route to the Red River. According to appointment, they do meet Aaron Burr at the mouth of Cumberland; and by way of proving the mere fact of the meeting a perfectly innocent one, on the face of it, the counsel in the defence, have compared it to the voluntary meeting of a company of militia. But where is the resemblance? Was Aaron Burr an officer of militia in Kentucky? Was he even a resident? He was neither. Were the men themselves militia of Kentucky? They were not; nor were they inhabitants of it; they were men from various states—on soldiers pay, and the greater part of them personally unknown to the leader, to whose service they came to devote themselves. If the persons who composed this as-

semblage, in their individual characters and in their relation to each other, bore no resemblance to a company of militia, let us see whether they resembled such a company in their object. The company of militia meet without any secrecy of purpose; they meet to improve themselves in military discipline, to qualify themselves better for the defence of their common country, their constitution and their liberties. But let us turn to the assemblage at the mouth of Cumberland, and ask what was their object?—We are now to enquire of it. Many of the men themselves were then in the dark, as to the precise object: but explanations were promised at that place. They are drawn up in a kind of hollow square, and formally introduced to their leader. They now expect a definite exposition of his plan: but no —he cannot explain at that time—there are too many strangers by—he will do it farther down the river—for the present he draws back, and covers himself with his old mantle of mystery. Now Sir, let it be remembered that four objects only, have been assigned for their meeting: two of them are innocent, and are assigned by the counsel in the defence; they are the settlement of Ouchita, and an invasion of the Spanish provinces, *in the event of war.* The other two objects, believed by us to have been connected with the meeting, are criminal; the invasion of the Spanish provinces, in the time of peace, and the dismemberment of the Union. Either of these latter objects accounts perfectly for Burr's silence at the mouth of Cumberland.

The disclosure would have been a confession of guilt: and "there were strangers by," who must have heard that disclosure, and would have borne evidence against him. But where is the ingenuity upon this earth, which can reconcile this refusal to disclose, with either of the innocent plans imputed to him. The counsel in the defence, have felt the force of this circumstance, and knowing that every candid enquirer would demand an explanation of this silence and mystery, they have attempted to account for it. They do not pretend, that if Burr's plan was solely the settlement of the Ouchita, there could have been any possible reason for his secrecy. That plan was entirely an innocent one, and might have been proclaimed to the world. But they affect to think, that the plan of invading the Spanish provinces *in the event of war*, required secrecy: why? "because it might have reached the ears of the Spaniards, and put them upon their guard." The man must be easily satisfied, indeed, to whom such an explanation as this would give satisfaction. Sir, did the Spaniards require to be told, that *in the event of a war with us* their provinces would probably be invaded. Did they not know without being told by Aaron Burr, that that would be a natural and immediate consequence of war? They believed, indeed, or affected to believe, that we had passed their boundary and invaded their provinces even in time of peace: Yet here are gentlemen who would have us so childish as to believe, that these people would

not have expected such an event in time of war. If the Spaniards had been separated from us by an ocean or a sea, there would have been some plausibility in concealing the object of a naval equipment, which was destined against them.—But when we were separated only by a rivulet or an ideal line:—when they were disputing with us every day, the question of boundary—and hostile troops were prepared and arrayed against each other on this question—when they saw that in the event of war, there was no theatre of battle except on their territory or ours—can a man in his senses believe for a moment, that they could doubt we would endeavor to carry the war into their provinces if we could—or that after a declaration of war, they would wait to learn such a design before they would begin to guard their frontier. If there be any man who is predetermined to believe Aaron Burr innocent, he may be capable of swallowing this absurdity—but no man who is disposed to enquire candidly, can believe Aaron Burr so shallow, or so puerile, as to have had any such motives for his secrecy. He knew that the Spaniards would have laughed to scorn, the wiseacre who should go to tell them, that in the event of war, the Americans would invade their provinces.—If this secrecy was not necessary in relation to the Spaniards, was it so in relation to our own countrymen? If the invasion was to depend on the event of war, there was no guilt in the design, and Aaron Burr has given us to understand

that such is his impression, by interrogating the witnesses as to the fitting out privateers and other preparations publicly made in our ports in the expectation of war. If such was his intention, we learn, then, that according to his own opinion, there was no guilt and consequently no motive for concealment on that score. On the contrary, there was every motive for publicity; if he meant a lawful and innocent act—an honorable and patriotic enterprize, in his country's behalf, in the regular course of war, to have made public his design, would have been the natural and obvious mode of swelling the band of his followers. Yes, Sir, if instead of skulking through these states, under such circumstances of mystery, secrecy and guilt—if instead of remaining, contented and silent, under the blasting suspicions and execrations of his own country, he had boldly confronted them and avowed the plan—if he had gone throughout the United States, preaching this "crusade against Mexico," *in the event of war, and under the sanction of his country's government*, the preaching of Peter the hermit, would have been tame and gentle in comparison.—Yes, Sir, if he had taken this bold and noble ground—christendom never poured upon the plains of Palestine, a host more bright and glorious than would have rushed to his standard.—While then upon the supposition of either of these innocent plans, or both of them, being his true plans, there was no motive for concealment, there was every motive to disclosure. But we have seen, that Aaron Burr, at the mouth of

Cumberland, shrunk from the disclosure, which innocence would have courted, and took refuge under that concealment, to which guilt only would have descended to retire. From the conduct of Burr, let us look to that of the party, which accompanied him. What should have been their conduct, Sir? What would have been the conduct of any plain and honest men, who were determined to act above-board—to do nothing in violation of the laws of their country, and to keep their own characters free from suspicion? After the clamours which had rung through the western country, and re-echoed through the Union, against Aaron Burr—after the suspicious darkness and mystery under which, they had been engaged, and referred to the mouth of Cumberland, for explicit information—would they have been satisfied with the manner in which Aaron Burr drew back from that explanation, and particularly with the reason which he assigned for it—"that there were too many by standers:"—it is not easy to believe that they could have regarded this refusal to disclose, in any other light than as a tacit confession, that his plans were not such as he could make public with impunity—in fact, as a plain confirmation of the suspicions, that his views were in violation of the laws of his country. Yet, Sir, this party, instead of entertaining these suspicions so natural, one would think so unavoidable amid so many suspicious circumstances, instead of refusing to proceed until those mysteries were cleared up by explana-

tion, devote themselves to Aaron Burr, and his schemes, *whatever they might be.* They are satisfied with a general reference to the captains of the boats and the chiefs of the party, of whom we learn, that the prisoners, Smith and Blennerhassett were two. They drop down the river in a body, and notwithstanding the civilities of Captain Bissell, they find it convenient to pass Fort Massac at Midnight. Sir, put together the circumstances of this meeting:—bring the scene before your eyes:—was it upon the face of it an innocent meeting? was it even an equivocal one?—On the contrary, was it not unequivocally, deeply, indelibly marked with the traits of suspicion and guilt? Yes, Sir, before the world will believe that the conduct of Burr and his party, at the mouth of Cumberland, was innocent, gentlemen must invent some other solution of his mysterious silence, than the settlement of the Ouchita or the invasion of Spain in a time of war.

From transactions on the spot, then, I feel myself warranted in concluding, that their views pointed to treason or misdemeanor, or both. Either of these views, furnishes a satisfactory key to the movements at the mouth of Cumberland—neither of the other views, we have seen, does furnish such a key: and while these four remain the only plans ascribed to the party, reason and judgment will certainly select those to which their actions fairly and directly pointed in preference to those to which they did not point and to which they bore no relation.

But let us enquire into their views.

2. By evidence extrinsic to the assemblage itself.

Here we are encountered by the violent outcry of the counsel in the defence. The gentlemen who began this argument by contending that treason, was a general, an entire thing *and had no locality*, the very instant we attempt to leave the mouth of Cumberland, and enquire into Burr's anterior conversations, and actions, in order to discover the object of his enterprize, are up in arms. Those recesses are too sacred for us to approach. "*Procul, procul este profani,*" they exclaim—"To the mouth of Cumberland—confine yourselves to that spot—stir not one inch from that place, to explore the secret purposes of Aaron Burr:" This is the crime which has no locality! and this the man whose views were so honorable to himself and his country!! But without stopping to moralize on this outcry and the obvious motives of it, let us examine the legal objections to our course of enquiry. "The constitution" says Mr. Wickham, "requires proof of the overt act by two witnesses; which two witnesses must prove *the same overt act*, that is, *the intention as well as the fact of the assemblage;* and the proof of the intention, as well as of the assemblage, must be drawn from the same spot—you cannot sever the fact from the intention—you cannot prove the fact of the assemblage at the mouth of Cumberland, and then go some where else to get proof of the intention of that assemblage."—

These are all the various forms in which he urged the same objection.

Now this objection is certainly not the less ingenious for having been precisely the objection urged by Messrs. Dallas and Lewis, on the trial of John Fries; it is the less authoritative however, for having been in that case directly over-ruled by the court. Trial of John Fries, page 100: Mr. Dallas is addressing the jury—"I proceed to the consideration of another point, and enquire, that supposing this to be treason, how is it to be proved?—The first clear rule is, that the overt act must be proved in the county in which it is said to have been committed, as on the present indictment, in the county of Northampton. 4 Hawkins, ch. 46, sect. 184-5-6. pa. 454. It was mentioned by Mr. Sitgreaves, that the specific overt act with which Fries is charged, was rescuing the prisoners at Bethlehem; but this does not appear on the face of the indictment. If however, that act was treason, *then not only the act, but the traiterous intention must be proved in the proper county, as the intention and the act are both essential to the crime.*" Again, the same gentleman, page 101, of that trial, says, "Thus then, in point of proof, the prosecution is defective: *it is not merely an act of violence, but a traiterous intention, that must be shewn at the place where the violence was committed.*"——"On the principle of the law, that I have stated '*till the overt act is completely proved in Northampton, the intention as well as the deed,* I take it, you cannot

go to any other county for evidence, by proving there an independent and substantive act of treason."—— "It is immaterial what he did, and what he said in the county of Bucks: the offence must be proved in all its parts in Northampton." I beg leave to refer you now, Sir, to page 110, of Frie's trial, where you will find Mr. Dallas concluding his address to the jury, by enforcing the same doctrine—enforcing it too, by all those pathetic considerations, which have suggested themselves to the counsel here. "Gentlemen: I can proceed no longer. The life of the prisoner is left, with great confidence, in your hands. There are attempts to make him responsible under the notion of a general conspiracy, for all the actions and all the words of meetings, which he never attended, and of persons whom he never saw. But this is too, too harsh, in a case of blood: It is inconsistent with the humanity, the tenderness of life, which are characteristicks of the American people, and especially of the people of Pennsylvania. Nor is it called for by the policy, or practice, of those who administered our government. I believe that to the chief magistrate, to every public officer, to every candid citizen, it will be matter of gratification, if after so fair, so full a scrutiny, you should be of opinion, that treason has not been committed. Such an event will by no means ensure impunity to the delinquent; for, though he has not committed treason, though the punishment of death is not to be inflicted, the violation of the laws may be

amply avenged upon an indictment of a different nature. The only question, however, now to be decided is, whether the offence proved, is like the offence charged, treason against the United States. The affirmation must be incontestibly established, *as to the fact and the intention*, by the testimony of two witnesses to the *same overt act:* but remember, I pray you, what the venerable lord Mansfield stated to the jury, on lord Gordon's trial,—remember that it is enough for us, in defence of the prisoner, to raise a doubt, for, if you doubt, (it is the principle of law as well as of humanity) you must acquit." This same principle, Sir, that the two witnesses to the overt act, must prove the intention as well as the act, and that the proof must be drawn from the same place, is pressed still more closely by Mr. Lewis, in page 148, of the same trial:—" It is unnecessary for me to turn to the books to prove that confession of the party, or words spoken by him, taken perhaps in the time of fear, are not to be regarded by you. This was so plainly improper, that the law of William III. making two witnesses necessary, or confession in open court, was enacted: I need only turn to our own laws (Judiciary act.) There must be one of two kinds of proof: the party in open court must confess, for confession out of court, cannot avail, even if made before 10,000 witnesses: or else two witnesses must prove the same overt act, and he must be convicted upon that indictment, if any. If you are to go to all parts

of the country for heated words, heard by any body, in any circumstances, I must consider it as a very scandalous abuse of the statute of Edward III. I think it impossible to hesitate at what was the meaning of Congress, when they made this act, and therefore, shall barely recur to the evidence. Here is a proof, that the prisoner came up to Bethlehem, where he acted in a certain manner; but the gentlemen concerned for the prosecution, think that does not sufficiently indicate his design, and therefore, they travel to Jacob Fries's, to Kline's, and a number of other places. Now suppose you convict him, I intreat you to enquire from what evidence you do convict him? Is it from the overt act committed at Bethlehem, or from that and other circumstances together? If this is the broad ground upon which you go, do you convict him upon the evidence of two witnesses to the same overt act, transacted at the same place? No, you do it upon the evidence of two, and a number of other evidence besides, on a variety of circumstances. Let me suppose for a moment, that two witnesses had come forward, and give an account of his conduct at Bethlehem, but that evidence was not sufficient to answer the indictment. You hear of such and such conduct at Quakertown, at Kline's, &c. &c.—I ask, would he have been convicted upon the evidence of those two, independent of any other? No, he would not. This is by no means agreeable to the statutes of William III. or Edward

VI. and in my view, totally inadmissible.—What is the consequence of such a verdict? Why, a man charged with murder, assault or what not, may know who the witnesses against him are, while one charged with treason, the highest possible crime, may not know, if you can travel from town to town, and from county to county, for the evidence; if you can bring correspondence, &c. from every part, of which the prisoner knew nothing, until brought before the court. No man would be safe in the admission of such things, but you must form your opinion alone from the evidence of two witnesses relating to the act committed at Bethlehem, agreeable to the indictment. The statutes, and our act of congress, mean and intend to prevent, this kind of rambling over the whole state, for evidence; or indeed upon the doctrine of the gentlemen, notwithstanding the act says otherwise, they cannot with equal propriety go throughout the United States to collect evidence to support the prosecution, which was never seen nor heard of before." Thus, Sir, we find in the addresses of Mr. Dallas and Mr. Lewis, precisely the objection now urged by Mr. Wickham. I have read those long extracts, for the purpose of shewing, not only that the objection itself, is the same; but that every argument and every topic of declamation, by which the gentleman has sought to support it here, has been perfectly anticipated on the trial of Fries; in short, that he has not altered the shape of one single

position in relation to it. I do this, not by the way of divesting Mr. Wickham of the merit of originality:—for the quotations only prove that two ingenious minds, set to work upon the same subject, will be very apt to fall into the same train of thought:—but my object is, to shew that the objection precisely in the shape in which it is now presented, and supported by every consideration which is now offered, has been already considered by a federal court of equal dignity with this. It only remains now for me to shew, how that court disposed of the objection.—It is Judge Iredell who speaks—

"Now, gentlemen, is the proper time for me to state one or two points, concerning the law of evidence, of which you have heard much from the bar. As I observed, there must be two at least to prove that the act of treason was committed at Bethlehem. It is the opinion of the counsel for the prisoner, that you must be convinced, not only of the fact by two witnesses—not only that he was concerned in a certain act, but that you must have the evidence of two witnesses, at least, by evidence drawn from the same place, that it was done with a treasonable intention, before you can pay any attention to any other evidence whatever. The fact is, that when the overt act is proved by two witnesses, it is proper to go into evidence to shew the course of the prisoner's conduct at other places, and the purpose for which he went to that place where the treason is laid, and if he went with a treasonable design, then the act of treason is

conclusive. In this I am supported by a very respectable authority on Crown Law: Foster in the case of Deacon, from which it appears, that it is enough to prove, that a rebellious assembly of armed men were there, and that the prisoner joined them. In order to prove to you fully, the design with which the prisoner went to Bethlehem, and joined in this great outrage, I shall select some of the evidence respecting those previous transactions; it is not necessary to state the whole." "The judge here read the evidence of James Chapman, John Rodrick, Cephas Childs and William Thomas, respecting the conduct of Jacob Fries, on the 5th of March, and respecting the meeting with Fowlke, and Rodrick, near Singmaster's; and also the transactions of the 6th, at Quakertown, which evidence he said so confirmed each other, that no doubt could be entertained."

Mr. Lewis was not satisfied with the manner in which Judge Iredell had charged the jury upon the point: and therefore when that Judge had finished his charge—"Mr. Lewis stated a question to the court, whether the overt act laid in the indictment in a certain county, must not be proved to the satisfaction of the jury, both as to fact and intention in the same county, or whether the overt act did not include both fact and intention.—To which Judge Iredell replied, that he considered Foster's Crown Law as settling that point—when two witnesses are produced, which proves the overt act laid in the indictment, there might be then evidence drawn

from other counties respecting the intention—this is the opinion of Judge Foster, and it is my opinion."—" Judge Peters. I think the overt act and the intention constitute the treason, for without the intention, the treason is not complete.—The intention may possibly be gathered at the place where the act was committed, or it may not; if not, evidence is admissible to prove it elsewhere." Fries's trial, 171. 174-5.

Considering the general principle then as established, that after proving the fact of the assemblage at the mouth of Cumberland, it is competent for us to go eslewhere for evidence to prove the intention of that assemblage, I should proceed directly to the various conversations of the prisoners with the several witnesses who have been examined. But before I can do this, there are other legal obstacles to remove. For gentlemen have next contended, that in the case of treason, the declarations of a prisoner are not evidence even against himself; because the constitution has said, that the *overt act* must either be proven by two witnesses, *or by the confession of the party in open court:* hence they say, that no declarations by the prisoner, are of any avail except they be made in open court.

There is certainly all the difference for which the Attorney has contended, between confessions in their legal sense, and those conversations of Burr and Blennerhassett, and the rest of the party, on which we rely. Confessions are posterior to the crime; they imply conscious guilt

on the part of the confessor:—they are, says Blackstone, the most suspicious kind of evidence, because they are liable to be drawn from the party by promises or threats, by the motives of hope or fear. But the conversations on which we rely, were of a totally different description, both in point of time and character—they flowed from a totally different state of mind, and are liable to none of the objections which Blackstone makes to confessions. They were conversations in the commencement and progress of the enterprize, had by the leaders with various persons, whom they wished to draw into their views—they were voluntary delineations of their plans—exhibiting them in all their most brilliant and alluring points of view, and exhibiting the *data* on which they calculated for complete success. These conversations were in fact, the means which they used to ensure success, and formed a part of the transaction.

Again, Sir, putting aside this distinction: nothing is more clear than this; that when the constitution speaks of the confession of the party in open court, it speaks of that confession, as the *sole* evidence on which, the conviction is founded. Its words are,—"No person *shall be convicted* of treason, unless on the testimony of two witnesses to the same overt act, *or on confession in open court.*" But suppose the conviction is sought, not upon the ground solely, of the confession; but on other grounds, to which the confession is brought in, merely as corroborative—Will the confession not be re-

ceived in such case? Hear Judge Iredell—"We now come to the confession of the prisoner voluntarily made on his examination before Judge Peters. Here is a point of law relied on by the prisoner's counsel—that no man shall be convicted of treason, but on the evidence of two witnesses, *or upon confession in open court.*—This is the provision in England, as well as here, and the meaning is, that no confession of the prisoner, *independent of two witnesses, or without the facts have been established by two witnesses*, should be *sufficient* to convict him: *but if two witnesses have proved a fact, the confession of the party may be received by way of confirmation of what has been sworn to.* In former days, in England, it was allowed, that confession out of court, and the proof of the witnesses, should be sufficient to warrant conviction: but happily our constitution would not admit it: if an hundred would swear to it, that danger is wisely avoided. Instances enough are in the recollection of the court, of a civil and criminal nature, where confessions have been received; but the jury are to judge from the evidence how far that is to be regarded.

"*Evidence may sometimes be given, which may be doubtful, and wants corroboration; you will judge whether that is or is not the case at present.* But if the confession of the prisoner, should go to confirm the evidence, if sworn to by two witnesses at least, it may be received: but unless it does go to corroborate other testimony, I do not think it admissible." The

Judge concludes this discussion, by observing—"Whatever objections there may be, as to confession in general, it does not apply in this case, *because it was voluntarily given.*" This discussion, it is to be remarked, is strictly in reference to *a confession*, taken in Blackstone's sense: that is, a confession after the crime—a confession under the oppression of conscious guilt—a confession liable to be drawn from a man by threats or promises, by motives of hope or fear: yet we learn by the unreversed opinion of a court of equal dignity with this, that even such a confession is competent as corroborative evidence. With how much greater force does this argument apply to the spontaneous declarations of the prisoners in the case at bar—declarations made without any possible motive of promise or threat—and made merely in promotion of their common views.

So in England, where the statute of William III. requires precisely, the kind and degree of proof, which our constitution requires, to wit, proof of the fact by two witnesses, *or confession in open court*, it has been decided that "Verbal confessions and what a prisoner has been heard to say at any time in conversation, or by observation relative to the matter in issue, may be given in evidence against him. 1. McNally, 361. on the authority of 2. Hawk. P. C. ca. 46. 2. St. Trials, (Harg.) 1005. Also—"And therefore words spoken at any time, may be given in evidence to support an overt act of high treason, though not treason in themselves."

Id. on authority of 1. Hale, P. C. 116.—Fost. 202.—1. Hale, P. C. 114.—But it is objected, "that although it should be true, that antecedent declarations may be given in evidence, where the act which they go to explain, is in itself unlawful, yet this has never been done, where the act is equivocal,"—and Mr. Wickham has said, that "the wildest theorist in England never hazarded such a position—no judge ever ventured it—no decision proves it." This, Sir, is certainly a very spirited example of the climax in the *descender*: but unfortunately the ground on which it rests, is hollow.—For instead of the wildest theorists, the gravest advocates have hazarded, the sagest judges have ventured, and a recorded decision proves a position much stronger than that against which, Mr. Wickham contends—proves that not merely an equivocal, but a perfectly innocent act has been made guilty, by antecedent declarations! But let us answer the objection methodically.

1. I think it has already appeared, that the act of the meeting at the mouth of Cumberland, was not equivocal, but upon the face of it bore the marks of guilt. If this be so, the objection, although true in the abstract, has nothing to do with the case:

2. We have seen by the authority of McNally, that the rule is general—*whatever* a man has said *at any time* relative to the matter in issue, is admissible without any discrimination as to the *prima facie* guilt, equivocality or innocence of the act to which they relate.

3. I repeat that it has been decided, in flat contradiction to the arguments and exclamations of these gentlemen, that an act not merely equivocal, but absolutely innocent upon the face of it, has been converted into a guilty one, by antecedent declarations. The case to which I allude is, that of Arthur Crohagan, reported in Croke Charles, 332—"Arthur Crohagan, an Irishman, was arraigned the same day, viz. 25th November, in the ninth year of Charles the first, for that he being the king's subject upon the 9th of July, 7th of Charles 1st, *regis nunc*, at Lisbon in Spain, used these words:—"I will kill the king, if I may come to him," and that in August 9th, Charles I. he came into England for that purpose." This is the statement of the case from the original report. The result of it was that the act of his coming to England in itself perfectly innocent, was converted into high treason, by words spoken in heat, two years before and in a different country.

But it may be thought that in this case, the antecedent declarations were admitted on the ground that they were, in themselves, an overt act of compassing the king's death. Let us hear Judge Foster's opinion on this subject—"In this case, (Crohagan's) the words though laid in the indictment, as one of the overt acts, could not be so properly deemed an overt act of treason, as an evidence against the man out of his own mouth Quo Animo *he came into* England. *The traiterous intention proved by the words converted an action, innocent in itself,*

into an overt act of treason." It is true there is a slight collision among the books on this question, whether the words in Crohagan's case were admitted in evidence as being of themselves an overt act, or merely as explanatory of the intention and as giving a colour to the act of the prisoner's coming into England: and that the discussion may have that openness and candour which befit a prosecution carried on by the people of the United States, I beg leave to collate the authorities on this point. [Here Mr. Wirt read 1. Hale's P. C. 114-16, with Sergeant Wilson's note on that passage—Kelyng 13, with the marginal note of Lord Holt and the additional note of Browne—and then Judge Foster's review of the whole, Foster 200-1-2-3-4.] The result of the whole is, that the coming to England, was the overt act, and that the words were received merely as explanatory of that act.

4. The books abound with cases shewing, that if a man go out of the kingdom (an act also perfectly innocent in itself) and it can be found, that before going, he used words which manifested an intention to go and join the enemies of the king, the act of his going out is thereby coloured into treason. It may be said that these are all cases of a distint species of treason: of the treason of compassing the king's death, and consequently have no application to the treason of levying war.—I answer,

1. That those cases meet directly the objection which we are considering. What is that

objection? That an equivocal act ought not to be converted into a crime, by the antecedent conversations of the agent:—it is this general and abstracted principle which has been the subject of so many exclamations, full of tragic action and horror. Yet here is the case of Crohagan, and the cases of Lord Preston and others, in which acts perfectly innocent, are converted into crimes, simply by the force of antecedent declarations.

2. The rule read from McNally, that words uttered at any time, may be given in evidence in a charge of high treason, in order to explain the character of an act, is laid down as a general rule, applicable to all cases of high treason, and the authorities on which he bottoms it prove, that there is no propriety in restricting the rule to any particular species of treason.

3. If it were even true, that the rule had not been laid down in any case except in a case of compassing the king's death, this would be no evidence that the rule should be confined to such cases: Because since the statute of Ed. the indictment for compassing the king's death, has become almost the only form of prosecution for high treason;—it has become a kind of *nomen genericum*, of which the other treasons are mere *species:* and it is not to be wondered at, therefore, if we meet with the rules of evidence in such cases only.

4. In order, therefore, to ascertain whether this rule of admitting declarations in explanation of acts, is to be confined to prosecutions

for compassing the king's death, or whether it extends to other species of treason also, the court would investigate the grounds on which that rule takes place in the treason of compassing the king's death: and if they be such as exist equally in the treason of levying war, the court would apply the rule to this latter treason also: for when the reason is the same, the law is the same.

Now, Sir, let us for a moment, indulge this investigation, why were the words admitted in Crohagan's case.—Not because the words themselves were the treason, as we have seen by the authorities just collated: for according to them, the words would not have borne an indictment for compassing the king's death.

Nor were those words admitted in evidence, because the crime *consists*, as the gentlemen say, in the intention; for then the intention might have been charged in the indictment as the crime, and the words would have proven that intention; which the same authors say could not be the case. According to them, the intention and the words combined would not have constituted the crime:—for there must have been *an overt act* which was to be laid in the indictment—Why, then, the question recurs, were these words admitted? The answer is natural and obvious—it was simply for the reason given by Kelyng and echoed by Foster, that "words are the natural way for a man whereby to express the imaginations of the heart"—and for this reason, they were admitted to explain the intention of the act.

Now, Sir, let us analize and compare the two kinds of treason, compassing the kings's death and levying war. In Crohagan's case, and all cases of compassing, what are the indispensible component parts of the crime? The act and the intention.—In levying war, what are the only component parts of the crime?—The act and the intention.—Since then, the component parts of the crime are precisely the same, why should words be let in to explain the intention of an act in the former case, and not in the latter.—If gentlemen say, that in levying war, the act should speak for itself, they run back to the ground which has been so often explored, and require force and battle or military array, which has been proven to be unnecessary in levying war:—nay even force, battle and military array could not necessarily constitute levying war, they might amount only to a riot; and then the question would still remain *quo animo*, has the thing been done? What was the extent of their design?

If gentlemen rely on the ground of hardship, on which they have harped with such unwearied delight, they will find every argument to apply with tenfold force in favor of Crohagan. For instance: in the case of Burr and his party, they say, you are turning an equivocal act into guilt, by antecedent words: but in the case of Crohagan, a lawful and innocent act was turned into guilt by antecedent words.—In Burr's case, they say, that the conversations on which we rely, took place from six months to a year be-

fore the overt act, and he might have repented: but in the case of Crohagan, the conversations took place upwards of two years before the act, and he might much more probably have repented: and the words of Crohagan were spoken in heat, in a casual conversation, without being calculated or intended to promote at all the purpose of his words, but rather to defeat them: while in the case of Burr and his party the conversations instead of being the offspring of heat and passion, were calm, deliberate and in promotion of their plan. Again, in the case of Burr, the conversations were continued: they are connected by a chain from the conversations at Washington in 1805, down to the fact in 1806: whereas in the case of Crohagan, there is no such thing: the words at Lisbon, are completely severed and cut off from the act by the interposition of two years.

In whatever light then you consider these two species of treason, there is neither authority nor argument for confining the introduction of explanatory words to the case of compassing the king's death. The rule is general. In law as well as in reason, on the ground of principle, as well as on the ground of hardship, it applies with as much aptitude and propriety to the case of levying war, as to the case of compassing the king's death. But

5. There is a case in Kelyng, which shews at least by irresistible implication, that words are admissible in this very kind of treason: and that not where they go to explain an act which is

equivocal or innocent: but where in truth there has been no act at all on the part of the accused. After stating in the first resolution of the court, that if several persons agree to levy war, and some of them, *appear in arms*, and others do not, it is levying war in all, as well those who do, as those who do not, he proceeds, pa. 19.—" In the next place, we being informed, that though there was a conspiracy to raise war in the *North riding* of Yorkshire, as well as the *West riding*, where some did actually appear in arms, yet it could not be proved, that those in the *North riding* did *agree to the rising that was in the West riding*, or that they knew any thing of it, and so would not be within the first resolution." But suppose it had been proved, that those in the *North riding* knew of and agreed to the rising in the *West riding*, is it not irresistibly clear, that in this case those in the North riding would have been within the first resolution, that is guilty of levying war? But as according to that hypothesis, they had *done* nothing, how could their consent and agreement have been proven? How else but by their declarations? If there be any other mode, let it be pointed out: if there be not, it is clear that those in the North riding, who had *done no act whatever*, might have been convicted of levying war by the evidence of their words only. So in Fries's case, which was a case of of levying war, the Judge admitted the explanatory evidence of conversations held by the prisoner at various times and places, other than those laid in the indictment, and in spite of this

specific objection, then urged by the prisoner's counsel, the Judge charged the jury on that evidence. Nor did he rest the introduction of that evidence on the ground, at all, that the act done by Fries, and whose object they went to explain, was in itself unlawful: but on the general ground, that declarations are competent to explain the intention of an act charged to be treasonable.

Upon the whole I conclude, that there is nothing in the distinction, which has been so much laboured between the different kinds of treason, so far as it is sought to be applied to this rule of evidence: and that the conversations of each prisoner would be admissible as against himself, to prove the intention of this assemblage, even if it had been *innocent* on the face of it, which I think it is very clearly established that it was not. But still before we can be permitted to proceed with the examination of the evidence extraneous to the assemblage at the mouth of Cumberland, we have some other objections to remove. For it is said that admitting the declarations of each prisoner to be evidence against himself, it would be illegal and oppressive to extend these declarations to others—for that no man ought to be condemned by the words of another.

To this I answer, that what a man says or does by another, he says or does by himself.—This was the base on which the supreme court received Swarwout's declarations against Burr.

" Colonel Burr's letter, authorised Mr. Swartwout, to speak in his name." But there are other ways, than by letters, of authorising a man to bind another, both by his acts, declarations and writings—as by embarking with him in the same conspiracy. Thus in the cases of Hardy, Tooke and Thelwall, we have seen on a former occasion, that such evidence was perpetually received. Mr. Martin has indeed admitted that in those cases, the connexion being once established, it was proper to receive such evidence for the purpose of shewing the nature and extent of the design. That is all that we ask here.

But this will not be allowed to us, for the gentlemen pressed by this authority, flee again to their old sanctuary, the distinction between compassing the king's death and levying war, and while they admit this to be the rule of evidence in the former case, they deny it in the latter. To establish their point, it will not be enough for them to shew that the case in which the rule was pronounced, was a case of compassing the king's death; for as was before remarked, this has now become in England, the only form of indictment for high treason, and therefore it is of necessity, that the rules of evidence will now be found pronounced only in such cases. But I take it, that when these rules are so pronounced, they become general rules of evidence, unless they are expressly restricted to the immediate case before the court, or unless there be something in the peculiar nature of

the case to confine the rule exclusively to it.—Now the rule in the cases of Hardy, Tooke and Thelwall, is no where confined, by the language of the bench, to the treason of compassing the king's death. Is there any thing then in the nature of the case or in the reason of the rule which does so confine it. The reason there assigned by the court, for receiving the declarations of one prisoner as evidence against another, for the purpose of proving the extent of the design, is simply this: that they are connected together in one common association, that they stand reciprocally pledged to each other, for the support of their joint views: and that the objects of their association may be fairly learnt from the spontaneous declarations of any member of it. This being the reason of the rule there certainly can be no propriety in confining it to the treason of compassing the king's death: on the contrary, *wherever a conspiracy exists*, whether the case be of a capital or an inferior nature, one would think that the reason of the rule and therefore the rule itself, applies with equal aptitude. And such Sir, is the law. I beg leave to refer you to 1. East's Crown Law, 96-7. He is treating of the evidence in high treason *generally*, and not in any particular species of high treason.—"As it happens more frequently in trials for this, than for any other offence, that the acts of some of the conspirators in the absence of the others, are given in evidence against them, it may be worth a more particular enquiry in what manner the rule is applied."

" In this, *as in other cases founded in conspiracy*, the conspiracy or agreement among several, to act in concert together, for a particular end, must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner."—How is this connection to be established? East proceeds to answer it.—" And this must *generally speaking*, be done by evidence of the parties *own acts* and cannot be collected from the acts of others independent of his own; as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts. *But it may also be done by evidence of the acts of the prisoner, and of any other with whom he is attempted to be so connected, concurring together at the same time, and to the same purpose or particular object.*—And here the evidence of a conspiracy is more or less strong according to the publicity or privacy of the object of such concurrence, and the greater or less degree of similarity in the means employed to effect it. The more secret the one and the greater the co-incidence in the other, the stronger is the evidence of a conspiracy."—He adds—" But when the connection between the parties, by one or other of the means above mentioned, is once established; of which the court must in the first instance judge, previous to the admission of any consequential evidence to affect the prisoner by the acts of others, to which he is not a party or privy; then whatever is done in pursuance of that conspiracy, by one

of the conspirators, though unknown perhaps to the rest at the time, is to be considered as the act of all."

To ascertain then, whether this rule of evidence, applies to the case at bar, we have but to ask, whether this be a case founded in conspiracy? The gentlemen on the other side, say it is not: why? Because the indictment for levying war does not charge a conspiracy. They do not perceive how this construction of the authority recoils upon their own argument: for neither in the case of compassing the king's death, is the indictment for a conspiracy, nor does the crime in its nature, imply a conspiracy. A single individual may compass the king's death. Such was the case of Crohagan. He was a solitary Irish Priest, and came to London to do the business of Charles the I. in the same style that Ravaillac had done that of Henry the IV. of France—by his single hand. Now a single individual can never levy war: it requires the concurrence and co-operation of others:—it is therefore a crime which in its nature is founded in conspiracy, and therefore considered on general grounds is more strictly within the reason of the rule, than the crime of compassing the king's death. Since then the rule is announced by the authority in general terms, and since its reason covers the case at bar, there can be no justice in refusing to apply it here.

I acknowledge however, that before we can bring the declarations and acts of the prisoners

to bear reciprocally upon them, we must establish their connection in the same conspiracy in one of the ways stated by East. Let us first examine the evidence of Burr's being connected with Blennerhassett; and let us do this,

1. By the acts of Burr himself.

2. By his own acts and those of Blennerhassett, concurring at the same time and to the same purpose.

1. By the acts of Burr himself.

1. The first act which it is proper to notice, is his visit to the island, and his domestication in the family of Blennerhassett, in the autumn of 1806, just at the time when the scheme was rapidly advancing to its crisis, and at the very theatre of its explosion.

2. His ride in company with Blennerhassett to Marietta: his contract for the boats there; his drafts for the payment indorsed by Blennerhassett as a thing of course; and the admitted authority of Blennerhassett to aid in making that contract, and receive the boats when built.

3. It will be remembered, that when Peter Taylor was sent to Kentucky, with a letter of alarm to Blennerhassett, Burr received that letter, and although addressed to Blennerhassett, he broke the seal. A liberty which a man of Colonel Burr's *decorum* would never have taken, had there not been the most perfect understanding between the two, and the most entire community of interests.

4. His reception of Blennerhassett at the mouth of Cumberland, as one of his leaders, and

3. What I deem conclusive: his referring his crew to Blennerhassett, among the rest, for an exposition of his plans; most clearly and expressly admitting thereby, that Blennerhassett was in his secret and was co-operating towards his purpose; and most unquestionably giving him as full power to bind him by his words, as he had before given to Swartwout in the letter to Wilkinson.

But let us examine this connection.

2. By the acts of Burr and those of Blennerhassett concurring at the same time, towards the same purpose: I consider their mutual declarations as falling under this head, since they were indispensible parts of the means used in promotion of that purpose.

1. Compare the developement of the scheme by Burr to Eaton, and that by Blennerhassett to the Messrs. Henderson's; you find the strictest identity: the separation of the Union—the Alleghany the boundary—the invasion of Mexico—an empire in the West—himself the emperor—Orleans his capitol.

2. Compare the arguments suggested by Burr to Eaton, and to the Morgan's, as justifying a separation of the Western from the Atlantic States, with those urged by Blennerhassett to the Messrs. Henderson's, and enforced by him in his Querist, *the first number of which, must from its date, have been written and sent to the press, while Burr was at the island*—you will find the arguments precisely the same, even in their terms—the enormous sums paid by them to

wards the federal government, while they could maintain a government of their own, at a less expense—the neglect of their interests by the federal government—and their natural and constitutional right to have a government of their own.

3. The incentive which both presented to fire the people of the west, into insurrection, and promote at the same time, their object of a Spanish invasion. Burr assured Commodore Truxton that very many respectable characters were embarked in his enterprize—many of the officers of the navy and army, and General Wilkinson among the rest. Just such was the flattering and auspicious picture of the plan, which Blennerhassett presented to the Messrs. Henderson's.

4. The motive urged by them both for seizing this particular moment to effect their purpose—that there was no energy in the government to be dreaded, and that with a handful of men congress could be driven into the Potomac. Nay we find Blennerhassett in his conversation with the Henderson's, repeating even the vain and idle, boasts of Aaron Burr—that *he* Burr, would turn congress out of doors, and that if the President gave himself any airs, *he* would send him to Carter's Mountain or hang him up. These gentlemen have lived to alter their tone and repent of their vanity. Blennerhassett has learnt by this time, that Aaron Burr is not quite the divinity he seems once to have thought him: and Mr. Burr himself, has had such wholesome

experience of his mortality, that I presume he will not soon again—

" Assume the God,
" Affect to nod,
" And seem to shake the spheres."

Lastly, the constant declaration of Blennerhassett, that he was embarked in Burr's enterprise, and the assent of Burr thereto at the mouth of Cumberland, will leave no doubt in a candid mind, of the existence of their connexion; and the consequent propriety, according to the rule of evidence which has been read, of receiving their declarations against each other.

So stands the case between Burr and Blennerhassett. As to Smith, it is in proof, that he was at the mouth of Cumberland—that he was one of the leaders—and one of those to whom Burr referred the men at Cumberland, for an explanation of his plans.

At the end of this legal discussion, through which, I have been compelled to travel, and which has been unavoidably much longer than I wished, I will make this remark: That every objection to the evidence which we have been considering, applies only to that branch of this motion, which demands the commitment of the prisoners for treason. As to that branch of it, which seeks their commitment for the misdemeanor, I have heard no objection to the competency of the evidence. Although the court should, therefore, think it inadmissible under the motion to commit for treason, they will

receive it under the other charge, and if it goes to support it, will commit the accused for trial in the proper state. I hope, however, that after the full and candid examination, which has been presented to the court, it does appear that the evidence is strictly proper, under the motion to commit for treason.

The usual hour of adjournment, having now passed by, and being myself much fatigued, I hope the court will permit me on Monday, to resume the subject and finish what I have to say in support of this motion.

[*The court accordingly adjourned, and on Monday Mr. Wirt, proceeded as follows.*]

Having endeavoured, Sir, on Saturday evening, to remove the objections to the competency of our evidence, I beg leave now to examine a few of those remarks, which were intended to attack its credit. Mr. Martin has passed several of our witnesses in review before us, for the purpose of convincing you, that they are not entitled to your confidence—and at their head, is General Eaton. When the evidence of this gentleman is recollected, it is not at all wonderful, that such serious efforts have been made to destroy him. You will remember, Sir, that three or four weeks ago, Aaron Burr, with a countenance and manner of the most awful import, announced to us, that he had sent for, and should soon be in possession of evidence, which would disqualify General Eaton from being a witness in any case whatever: He, therefore,

required General Eaton not to leave Richmond, but to remain and defend himself, if he could. What the charge was to be, he did not condescend to explain—he did not even name time or place, nor afford to that gentleman, any other clue, by which he could learn to what action of his life, the menace pointed, so as to prepare himself with counter-vailing proof. Aaron Burr had long known the secret of giving volume and importance to little and insignificant things, by shrouding them in mystery. The mountain is in labour for near a month; and that wretched old man Colonel Gaither, is dragged all the way from the state of Georgia, to deliver it. He tells us a long and crippled story of a court martial, held on General Eaton about ten years ago, in the state of Georgia; held to try him for charges on the arrest of Gaither himself; and he remembers, that on some of these charges Eaton was condemned. But what those charges were, he does not remember—he has no recollection of their nature. Now, Sir, let us pause one moment, to compare gentlemen's precepts with their practice. When we went back about ten or twelve months, to gather the views of Aaron Burr from his intrigues at Washington, they exclaimed against it as a montrous and shocking outrage upon justice and humanity, and, with a little hyperbolic licence, declared that we were calling on the man to answer for all the actions and conversations of his life. But they, we see, can without the least remorse, go back *ten years* in the life of General Eaton, for the purpose of

destroying his character as a witness, by the proof of a particular fact, and that without giving him one moment's previous notice of the nature of the charge. Innocence, however, has nothing to dread—and General Eaton met the charge with all the composure of innocence. What was the sequel of that adventure of the court martial? The sentence of the court which had fallen on two of the most weak and ridiculous of the charges that were brought against him, was never confirmed by the department of war—while General Washington, during whose administration it happened, by way of marking his opinion of the procedure, not only retained General Eaton, in his rank and pay, but immediately employed him in the most honorable and confidential operations, and covered him with peculiar proofs of his favor: And Gaither, who, there is good reason to believe, had been at the bottom of this persecution—this Gaither, who is now brought here to tell this story of his abortive malice, is obliged to confess before he sits down, that he himself a few years afterwards, was permitted to retire from the army under the disgrace of an arrest. Such is the witness and such the mighty charge which is to render General Eaton infamous and disqualify him from giving evidence in a court of justice. But I will press this point no farther—it was not expected, I believe, that General Eaton would have been so well prepared to repel this calumny, "and roll the torrent back upon its source"—

the witness is sufficiently overwhelmed with confusion—he will repent of having ever left the state of Georgia on this business—and those who brought him will repent of having thereby thrown new lustre and triumph on a character, which they were malignantly seeking to blacken and destroy.

Baffled in this attempt, yet still bent on the destruction of Eaton's credit, Mr. Martin in his despair, has laid hold of tne toast, " Palsy to the brain, that shall plot to dismember, and leprosy to the hand that will not draw to defend our Union."—In that spirit of pure and attic wit, for which this gentleman is so distinguished, he has told us " that this toast shall be worse than a Burr in our throat." For my own part, I do not understand this menace, unless it was in allusion to the length of time which the gentleman meant to spend in canvassing that toast. As to the toast itself, those who wish well to the Union, see nothing in it, but a patriotic sentiment, cloathed in expression of peculiar beauty and energy. If there be any who wish a seperation of these States, and who would be particularly gratified that such a calamity should light upon the present administration—to such, the toast could have given little pleasure:—because, in language calculated to fix the attention and strike the heart, it preaches a doctrine in direct hostility with their wishes. But Mr. Martin has entered into a most extensive and elaborate investigation to prove General Eaton incorrect, in the opinion that he had given this

toast in the City of Washington: and it must be acknowledged that on this subject he has proved himself a most ingenious, astute and persevering investigator.* But what is the fruit of all his toils? A triumph over a mere conjecture. For General Eaton never pretended to speak, with certainty, as to the time and place of his having given this toast. He has given a very satisfactory reason, why he could not do so. His return to his native country from the coast of Africa, was welcomed by the hospitality of his fellow citizens, wheresoever he went—every where, feasts were given him—and at them all, he probably gave a toast. He could not, and therefore, would not say, with certainty, where he had given the toast in question—he thought it probably was at Washington. Mr. Martin having proved, at least to his own satisfaction, that the toast was not given there, concludes that General Eaton's evidence is not to be believed at all. Why, Sir, how often does it happen, and innocently too, that witnesses are mistaken in the time and place of events, even when they speak most positively: But it has never been thought that because a witness shall have been mistaken in circumstances like these, the mass of his evidence shall be therefore treated with contempt. Yet here you are required to scout the evidence

* *Pending the proceedings in this case, Mr. Martin had written several essays on this toast, in the Virginia Gazette, under the signature of Investigator.*

of General Eaton, because he was mistaken, not in a positive affirmation, but in a mere conjecture, and that conjecture about an immaterial incident.

We hear next of General Eaton's application to the President, to appoint Burr ambassador to the court of Madrid, or that of London—and Mr. Martin remarks, that both these nominations were favorable to the imputed views of Aaron Burr. General Eaton has explained the considerations by which he was guided in this step, and the obstacles which opposed a direct and public denunciation of Aaron Burr: Let those who affect to doubt this statement, make the case of Eaton their own, and ask themselves whether at the time of which he was speaking, and under the impressions which he had of Burr's standing and weight of character, they would have been willing to poise their single assertion against that of Aaron Burr, in such a case as this. As to the idea that Eaton's nomination of Burr as minister to the courts of Madrid or London, was favorable to his views—the answer is obvious—if this had happened at a point of time very remote from the intended execution of his project, and it had been necessary for him to go abroad, in order to get the aid of the Spanish or British Crowns, there might have been some foundation for the argument. But let it be remembered, that at the time of his communication with Eaton, the project was already cast and the means of its execution already provided, nay the execution was actually begun: for

he stated that " he was organizing a force on the western waters." There was no occasion then for him to go abroad—nay his being sent out of the country at the time, when the project had already begun to move, would certainly have had the effect of crushing it in embryo—since he was the common bond of union, which held its parts together, the vital spirit which gave it motion, the intelligence which directed it. His being sent away at such a crisis, would just as naturally and necessarily have produced the dissolution of the party, as the seperation of the soul from the body produces its death. As to General Eaton's sentiment, that Colonel Burr when placed on an eminence and put upon his honor, would have acted virtuously, I will not answer for its correctness—the counsel of Colonel Burr have laughed at it as ridiculous, and they know that gentleman much better than I do—But surely they do not mean seriously to contend, that General Eaton's having entertained that favorable sentiment of their client, is a proof that his own heart is impure—much less that it renders him infamous and disqualifies him as a witness. General Eaton's maxim of breaking faith with bad men, has also been a subject of animadversion, and has been ludicrously compared to the Jesuits maxim, " keep no faith with heretics." I know not in what school gentlemen have learned their ethics.—The author has never yet been submitted to my perusal nor the moral professor introduced to my acquaintance, who inculcates this reverential

respect for the secrets of traitors, and holds a man rather bound to see his country deluged with the blood of his fellow citizens, enslaved and ruined, than to prevent these consequences by denouncing the traitor, and proclaiming his plots. I had always thought our duty to our country, the first of moral duties—but I am now school'd and taught a truer doctrine—the moral wheel has turned completely around, and the paramount duty of life, is that which we owe to traitors, the worst enemies of our country.

But Mr. Martin thinks, that he has found a key to the subserviency of General Eaton's evidence to this prosecution: viz. the ten thousand dollars which he has received from the public treasury of the United States. He will not, he says, accuse the administration of suborning witnesses: but he will say that General Eaton had as good a title to these ten thousand dollars before he bore evidence against Bollman and Swartwout as since: yet he solicited the payment, in vain, before that event: and since, he has been paid:—that is, Mr. Martin will not directly accuse the government of subornation of perjury, nor General Eaton of being bribed, corrupted and perjured, but he will insinuate both these charges, in such a way, that it is impossible for his intention to be mistaken. This subject has been already explained—no doubt was ever entertained of the equity of General Eaton's claim—but the accounting officer, doubt-

ed his power to settle and admit the account.—An act of congress was passed, vesting him with this power, and the account was adjusted. Such is the clear and simple explanation, which has been given, and which would have been sufficient to a mind that was merely in quest of truth. But explanations are vain when a man is predetermined not to believe them: or rather to say he does not believe them: for let Mr. Martin's personal prejudices against General Eaton, be what they may, I cannot think that any American, in his sober senses, whatever may be the clouds of prejudice that surround and darken his understanding and his heart, could believe that the house of representatives and senate of the United States, would combine with the President, in a plot of bribery and corruption, for the oppression of an innocent individual—that house of representatives, too, which has been the subject of such a flaming eulogy for having resisted the suspension of the *habeas corpus* law. Yet this is the picture which Mr. Martin, a friend of order, and a respecter of the constituted authorities, exhibits to the world, of the executive and legislature of his country.

We come now to the Morgans: a family marked with all the amiable traits of the country—simplicity—honesty—hospitality—dignified by a love of country, and a degree of intelligence, that superadd respect to the affection which they invariably inspire. On this family, some very severe and most unmerited strictures

have been passed. In one moment, it is attempted to render them ridiculous: at the next, to render them horrible. They are accused of a breach of hospitality and confidence; of having decoyed the prisoner, Aaron Burr, to their house, by the show and guise of friendship, that they might pervert his conversations, and give themselves importance by betraying him to his enemies in the federal executive. This charge will scarcely be believed by the blindest adherent of Burr; it is certainly not believed by himself. Nor is it possible that any indifferent person who sees those gentlemen, the Morgans, much less he who hears them converse, will believe them capable of aught that honor might blush to avow. It is true, that Mr. Morgan the father, actuated by the purest principles of benevolence, and of personal respect and affection for Aaron Burr, having received a note from him, announcing his approach with Colonel Dupeistre, welcomed him to his house.—You have heard the sentiments under which this meeting took place; and it seems to me impossible for you to doubt, that on the part of the Morgans, at least, it was a meeting of mingled gratitude for past civilities, and love and veneration for the imagined character of Aaron Burr. Here let me ask of these moralists of a new school, whether Aaron Burr had a right to abuse this sentiment—whether he had the right to insult and degrade the hospitable bosom, which had so generously opened to receive and to warm him in the winter of his political and social desertion, by

making that bosom the depositary of a foul secret —by forcing his guilty confidence upon it—and in the place of conscious innocence, purity and peace, to convert it into a mansion of self reproach—self debasement, and wretchedness.— Yet this was the return which he attempted, and because they would not consent to this scandalous humiliation, they are charged with perfidy and a breach of hospitality. The accusation has been made; but it will be more apt to recoil on the man who so unjustly and ungenerously urges it, than to injure the respectable and attractive family, against which it is directed.

But it has been said, that these gentlemen deserve the less reliance, because they saw and heard every thing through the mist of suspicion. Nothing can be more incompatible with fact.— The truth is, that when Aaron Burr was received and welcomed at Morganza, he was considered as the martyr of courage and honor, the victim of unjust persecution. Every thing which he said and did then, was viewed through the most favorable medium: and his conduct must have been strongly marked, indeed, before, through such a medium, it could have been seen under the aspect and in the hue of guilt.

As to Sergeant Dunbaugh, I will take the liberty to say, that Aaron Burr, is the last man who should attempt to cast a reproach at him. For we learn from Captain Bissell, the only witness who has said a word to his disadvantage, that Dunbaugh had been a favorite with him: that until he joined Burr, he had never known

harm of him—that even after he broke his furlough, such was his confidence in the man, and such the regard he felt for him, that in the letter which he wrote to Lieutenant Hughes, requesting him to report the desertion of Dunbaugh, he nevertheless "expressed the great confidence he had in him—*his anxiety lest he should have been deluded away by the followers of Colonel Burr*, or lest he should be sick—and if he was sick, he requested a friend to furnish him with some money."—Such was the man, until he knew Aaron Burr: by his seduction, he fell from his duty as a soldier: Burr knew that he was causing him to desert—he knew that his furlough was only for 20 days: we find him at Judge Bruin's endeavouring to extend it: you heard him ask the witness, Captain Bissell, the other day, whether a magistrate had not the power to extend a furlough, and when that question was answered in the negative, he remarked, "that it used to be so; and he thought that power might still lie in a magistrate." By this dialogue he confirmed Dunbaugh's statement, that it was he, Burr, who decoyed him down the river, and who was thus endeavoring by the aid of Judge Bruin, to provide a salvo for the offence. Yet this is the man who now, by himself and his counsel, represents Dunbaugh, as giving evidence with a halter around his neck. The man who has caused the crime, is the first to denounce his deluded instrument. Sir, where can be the moral feeling of a man, who can act thus, and of what would he not be capable?

But this insulted witness, Dunbaugh, is not left to stand alone. In every material allegation, he is supported by others: in the fact of the arms being concealed at the time of Fitzpatrick's search, he is supported by Stephen S. Welsh, the carpenter, who patched the auger holes through which, the ropes had passed, that suspended the arms in the water. In the fact of Burr's acknowledging the cyphered letter to Wilkinson, to be his, he is directly confirmed by Mr. Poindexter, the Attorney General of the Mississippi Territory. And in the strong fact of Burr's solicitude to procure men from the garrisons, even by desertion, and arms from the same places, *by any means*, give me leave to aver, notwitstanding the boasted magnanimity of Colonel Burr's character, that he will be completely supported by the evidence of Lieutenant Jackson, if that gentleman shall, as we expect, arrive before you pronounce your opinion. I make this assertion, from a view of his affidavit, which lies on your table, and which owing to some informality, cannot now be read. So that if gentlemen could even succeed in destroying Dunbaugh, they would still have before them an Herculean labour; since they would see witnesses starting up like Hydras's heads, affirming the very facts which we have heard from him.

As to General Wilkinson, whose censure we have heard in every tone of voice, and every variety of cadence, from the lugubrious dirge

of my departed friend, Mr. Botts, up, through the adagio of Mr. Randolph, and the allegro of Mr. Wickham, to the tuneful catch and merry glee of the facetious and Anacreontic Mr. Martin—he has been ably vindicated by the gentleman who went before me. I can add nothing to that vindication. But I propose to argue the merits of this question, in exclusion of the evidence of General Wilkinson: not through any want of confidence in the statements of that gentleman; but for the simple purpose of shewing that this prosecution can stand without him: for the purpose of shewing "that the guilt of Wilkinson would not, as has been contended, establish the innocence of Burr"—which is certainly one of the wildest paradoxes that ever was offered to the human understanding.

Seeing now, Sir, that there is no objection to the competency of our evidence, nor to the credit of our witnesses, to debar us from enquiring into the purpose of the assemblage at Cumberland, *by circumstances extrinsic to that assemblage*, give me leave to proceed with that enquiry.

Mr. Martin has contended, that the settlement of the Ouchita, was the object: that Aaron Burr sought only a peaceful asylum from the most unjust and ungrateful persecution, and to plant around him a colony of generous and enlightened spirits, whose converse might soften his exile from the land of his father's: and, by way of justifying the selection of the asylum, he has dwelt, with poetic rapture, on the Arcadian

bowers, the blissful paradise of the Ouchita.—"There," said he, with feelings, which could find no epithet sufficiently strong to satisfy them —"There you have——a paradise, indeed!"—An odd sort of a paradise this, Sir, from the account of the witnesses:—a paradise, which so far as we can learn, consists of exhaling marshes, putrid fens, and croaking frogs, dreary forests, and howling beasts of prey, with now and then, the accompaniment of a war whoop from the Indians on the west, or a serenade of martial music from the hostile Spaniards on the east! These are the advantages which Blennerhassett was to gain, in exchange for the simple beauties and sweets of his island, in the Ohio! No, Sir; I beg Mr. Martin's pardon: he did state another advantage, which he was to gain by his removal; and that was, (to use Mr. Martin's own words) that "he would get rid of the society of *the Wood county savages!*"—The state of Virginia, is under great obligations to this gentleman, Sir. He comes hither, not only to instruct us in law, but to impart to us the graces, too. Yet much I fear, that he is "wasting his sweetness on this desart air." His example is quite too sublime for our comprehension, much more for our imitation. I hope, therefore, he will excuse *the savages of Wood county*, if they prefer the straight forward, *right line* of country conduct, to those *serpentine* graces of the town, into which a more cultivated taste might lead them to fall.

But although I do not think Mr. Martin's idea of a paradise, a very aspiring one, yet, I perfectly approve the tract of argument on which he first entered to ascertain the real views of Aaron Burr. When he examined the character, habits and history of the man, and compared them with his situation in this country, for the purpose of enquiring what course such a man, so situated, would probably take, he was pursuing the enquiry in the style which nature and reason point out. This is the plan which the historian of this conspiracy, will inevitably adopt: and to you, Sir, who are enquiring into the *probable* object of the prisoners, what can be more natural, what more proper than to look at their posture in society, and ask whether there was any thing in that, to stimulate or to tempt them to the crime with which they are charged. It is certainly not so probable, that a prosperous and happy man, of a tranquil temper, should rush into criminal enterprizes, as a man of a restless and turbulent spirit, in adversity and despair. Character and situation, then, rise into judicial proof where the question is as to the probable guilt or innocence of a man's designs. So thinks Mr. Martin: so think I.

Give me leave then to follow the gentleman in this branch of his enquiry. What is the character of Aaron Burr? His counsel have drawn it: he is a man whose ardour and enterprize of spirit, are equalled only by the boldness and grandeur of his mind. Mr. Martin's words are, that "he is a man of as much activity and en-

terprize, as any in the world, except Bonaparte, and he is only not equal to him, because he has not had so good a chance." I believe it, Sir: and if *he has not had so good a chance*, the fault is not his. From the first organization of the federal government, there is reason to believe, that he looked to the highest offices and honors which it presented. According to Mr. Martin, it was the genius of Colonel Burr, which broke the federal phalanx, and opened the course to the career of his ambition. It was not by this exploit, I presume, that he recommended himself to the friendship of the counsel, from whom the remark fell. However this may be, the course was clear, and the people were to mark, by their confidence, the objects of their favor. Two candidates were presented: Aaron Burr was one of them. He had devoted himself to the people, and the people had rewarded him with their affection. They believed him a patriot of the purest and most disinterested principles, and they resolved to distinguish him by a most honorable proof of their confidence. But the first experiment convinced them that *his own aggrandizement*, and not the public good, was the idol of his soul. From that moment, he was gone. The wave of popular favor, which had so long buoyed and upheld him, which had floated and lifted him, until he almost touched the presidential chair, suddenly slipped from under him, and dashed him on a rock. He knew that he had never had any favor with the federal party: he now saw that he was forever

ruined with his own: while the virtuous and enlightened man, whom he had attempted to jostle from the seat destined for him by the superior favor of his country, was seen to become every day, more and more firmly fixed in their respect. Here I pause to ask, which of these two men was the most likely to feel that envy of which Mr. Martin has spoken, as being the source of this prosecution? I have heard of a man's envying the prosperity and honors of another: but I never before heard of a man's envying another's misfortunes and disgrace. Which of them, I ask again, would be the most likely to exclaim "*Acheronta movebo*" and start all the powers of Hell in his behalf," for such is the decorus language, which Mr. Martin has applied to the President. Sir, if Aaron Burr, really possesses that proud and lofty spirit, which has been ascribed to him, what must have been the state of his feelings, to see himself thus forever desolated—marked and blasted by the indignation and scorn of his country—his ambition mocked and baffled for ever, "*even in that point in which he had treasured up his soul*"—Sir, from such a man, in such a situation, would it have been matter of surprize, if amid the darkness and storms of the night, he had been heard to exclaim with Zanga,

—"*horrors now are not unpleasing to me,*
"*I like this rocking of the battlements;*
"*It bears a just resemblance to my fortune*
"*And suits the gloomy*" *purpose* "*of my soul!*"

Nor was it all, that his hopes of preferment were gone: we learn that his fortune was not yet made. In retiring from public life, then, he would retire not merely to obscurity, but to poverty—to poverty rendered more bitter, by the consideration that he had lost that public confidence, without which, it would not be easy for him to rise to fortune. What, Sir, was to have been expected from a proud, bold and adventurous mind, agonized by such a retrospect of hopeless ruin, and such a prospect of maddening humiliation; from a man who, we learn, is filled with all the conqueror's genius, as well as the soldier's fire. If in that state of abandonment and desperation, he had conceived some project of deep and direful revenge against his country, his crime would not have been without precedent. Rome and others have witnessed the same effects, from the same cause. It is not for me to say, that he did this; it is for you to decide. But this I may venture to say, that such a spirit, so troubled—so goaded and infuriated, would have been a very unfit tenant for those peaceful bowers, which the fancy of Mr. Martin has prepared for him on the banks of the Red river: the Academic shades of the Ouchita. No, Sir; there were other scenes and other objects far more congenial with it: The tumult and bustle of a camp—"the pride of achievement"—the blaze and roar of battle, and the shout of victory—a diadem sketched in bright perspective, and seen beyond the smoke of glorious war—these

were objects far more interesting and attractive.

There is nothing then in the character or situation of Aaron Burr, to prove that the Ouachita was his object: on the contrary, there is every thing in them to disprove it, and to establish the probability that his machinations pointed to war and treason.

In this frame of mind, he went forth in the spring of 1805, and whither did he go? To that quarter which of all others, he would have preferred, if his object was to dismember the Union: to a quarter in which a similar project had been for years in a state of fermentation. What precise views he entertained during that trip, we do not know definitely; but we learn from Major Bruff, (a witness introduced by the prisoners) that in the course of this excursion, Aaron Burr made proposals to Judge Easton, which had caused the hair to rise on his head, and astonished and confounded him so, that he was struck dumb: an effect, I presume, which could scarcely have been produced by the disclosure of a scheme to settle the Elysium on Red river, nor even by a scheme of invading the Spanish provinces *in the event of war.* In the winter of 1805, we find him at work in the City of Washington, and in Philadelphia. I do not propose, Sir, to detain you with an examination of the whole evidence in detail; I beg your indulgence only while I take a brief and rapid view of it, and answer some of the remarks which have fallen from the opposite counsel.

I will premise, that this is not a case in which you can expect a crowd of witnesses developing, in concert, the schemes of the prisoner throughout. He is a man of acknowledged address: versed in all the arts of intrigue, and covered with an habitual and mysterious secrecy, which he seldom lays aside. He is a lawyer too, and well knew where the boundary of innocent conversation lay, and the region of evidence began. From such a man, it is naturally to be expected, that he would move with the utmost caution and circumspection: That he would, in the first place, attempt no characters but such as were either cool or hostile towards the present administration: that even with these, he would advance no farther than he felt the ground firm under his feet, and that he would draw back on the first sound, that informed him it was hollow. That as the degree to which, his disclosures would thus proceed, were dependent entirely on the degree of approbation, with which each individual listened to him, it would naturally follow, that the witnesses would not all tell the same story throughout—for some of them having arrested his communications on the threshold would be able to give but a glimpse of his designs—others who had listened with more apparent complacency, would receive a farther developement, and be able perhaps, to tell you one half of his project—while it would be only the man whom he should believe *entirely resigned to his will*, that would learn the whole extent of his criminal enterprizes, and be able

to depose to them here. Now, Sir, in such a case, could these witnesses, testifying to different conversations, and speaking merely of the proportion of light which each had received, be said to contradict each other. The truth is, that in the case supposed, their statements coincide, so far as the confidence of the prisoner in each, permitted him to go, and the only want of complete and perfect unity in their narrations, would result from his being stopped by the different witnesses at different points of his communication. Such, Sir, is the case at bar, and gentlemen despairing of better grounds, have relied upon this contradiction, as they call it, among the witnesses. Now, Sir, if the witnesses were testifying to the same conversation, and were giving these different accounts of it, they might be said to contradict each other, and our confidence in them would be justly weakened. But Aaron Burr knew too well what he was about, to have a second witness to the same disclosure. He took each man single and alone; trusting no doubt, that his assertion of his innocence, would counterbalance that of any one witness to his guilt—nay, perhaps as Eaton apprehended, that notwithstanding his fall, the weight of his name, would still be sufficient to crush any individual, who might attempt to betray him. Gentlemen have not only relied on this contradiction among the witnesses, but they have selected one of those who stopped Burr before he had half disclosed his project, and they say, that the testimony of this witness, is the key to

all the rest. You know, Sir, that I am referring to Commodore Truxton, to whose eulogy I cheerfully subscribe. You remember that this gentleman, shortly after Burr opened his trenches before him, by speaking of his Mexican project, asked Burr, with solemnity, whether the President was apprized of his plans—to which Burr replied, with equal solemnity, "he is not"—then said the Commodore emphatically, "I will have nothing to do with it"—After which, as was naturally to be expected, we hear no more of Burr's disclosures to him. Yet this witness, whose eye-lids had been merely touched so that he saw men as trees walking; this is the witness, on whose full and perfect vision, they would have you to rely. But, Sir, let us look at this testimony of Commodore Truxton, and see how well it quadrates with either of the innocent plans imputed to Burr. It is unnecessary to remind you, Sir, that Commodore Truxton had at that time, been wounded by what he conceived an indignity on the part of the government, and that some resentful publications had taken place on the subject. It was on this string, that it was the pleasure of Mr. Burr to harp, and from this scene of affront and indignation, to point the Commodore's fancy to the consolatory and splendid prospect of the conquest of Mexico. "Colonel Burr observed," says the Commodore, "that he wished to see me unwedded to the navy of the United States, and not to think any more of those men at Washington. He observed, that

he wished to see or to make me an admiral"—An Admiral! Where? In the Ouchita swamps? We had a poet once, Sir, who honored Richmond with the publication of his works, and who among other daring flights of genius, wrote "Up Shockœ hill the Ships of Burthen steer."

This was thought pretty bold at the time; but how flat and tame is it, compared with this magnificent idea of an Imperial navy riding triumphant in the swamps of the Ouchita. O! no, Sir; federal gentlemen must give up their excellent joke of gun boat No. 9, navigating the cornfields of South Carolina, or relinquish this eclipsing idea of an Admiral on the Ouchita. But, Sir, let us pursue this point a little farther. Under what authority was it that the Commodore was to hold his commission as Admiral? Not under that of the United States: for Burr's expression was, that he wished to see him *unwedded from the Navy of the United States.* He was to be an Admiral then; but still not in the Navy of the United States. From what authority was he to derive that rank—we have a clue to that, in other parts of his deposition—Colonel Burr had begun this conversation by requesting the Commodore "to get the Navy of the United States out of his head, "as *he* had something in view, both honorable and profitable, which he wished to propose,"—what was this—the Commodore tells us—"An expedition into Mexico—"*he* intended to establish *an* "*independent Empire* in Mexico,"—and he

added, that " Wilkinson, the army, and many officers of the Navy would join."—To this the Commodore, like a man of honor, replied " that he could not see how any of the officers of the United States could join." Burr answered " that " General Wilkinson had projected that expe- " dition, and that he himself had matured it; " that many greater men than Wilkinson " were concerned, and thousands to the West- " ward." It was from Colonel Burr, then, the leader of this expedition, and the intended head of the intended Empire, that the Commodore's dignity of Admiral, was to flow. It is true, that Burr, in his conversations with the Commodore, put all these stately projects on the event of war. He knew to whom he was talking. He found the Commodore true to his honor, and firm as a rock. Was it to have been expected, that Burr, a veteran in intrigue, would have renounced all the benefits of his experience, and suddenly become such a Marplot, such a green horn, as to babble all his guilt to a man who had nobly expressed his surprise, that any officer of the United States, could join in such a project, and for himself, had indignantly declared, that " he would have nothing to do with it:" hence the salvo so scrupulously introduced " in the event of war." But will any man say he believes that it was the design of the accused to suspend his project, on the event of war? Why should he so suspend it? Out of respect to his own country? Respect for his country! Yes, Sir, he had shewn that respect, by

attempting to seduce, and declaring as he did to Truxton, that he had succeeded in seducing the officers of the army and navy of his country, from their allegiance; and drawn them into a scheme of conquest, under his individual banners and for his personal aggrandizement! Can any one believe that a man capable of a seduction so deep and damning to the honor and safety of his country as this, would still feel so much squeamish delicacy for that country, as to wait for her declaration of war? Or will it be said that if respect for his country, would not induce him to wait for a declaration of war, still his fear of opposition from that country, would induce him so to wait? But is it true, that he feared such opposition? Ask himself—"There is no energy in the government to be dreaded, with two or three hundred men, I can drive the President and Congress into Potomac, and with four or five hundred, I can take the City of New-York." Such was his talk to Eaton, and to the Morgans. Then according to the account of his forces to Commodore Truxton, and to Eaton—his officers of the army and navy—the army and navy itself, and his thousands to the Westward, he could not only have silenced all opposition on the part of his country, but have taken the reigns of her government, by compulsion, into his own hands. As little was it necessary, to wait for a declaration of war, in order to gain the co-operation of his country against Mexico. Her standing forces were already, as he declared, in his interest: and he told

Truxton, that the Mexicans themselves, were ripe for revolt: that his expedition could not fail, and that he was incapable of any thing chimerical, or that could lead his friends into a dilemma." In no point of view, then, in which we can consider the subject, do we see any reason to believe that it was his real intention to wait for a declaration of war.

Commodore Truxton, states in his evidence, that Burr, among other inducements to draw him into his views, " observed, that several " officers of the navy, would be pleased at being placed under his command—spoke highly of a Lieutenant Jones, and asked the Commodore if he had not sailed with him." Is this the Lieutenant Jones, who declared, that he would not obey the orders of his superior officer in receiving Burr on board his gun boat, and for which, he received so very brilliant a compliment from Mr. Wickham? Because if he be the same man, Commodore Truxton's testimony, if a key to nothing else, is, at least, a key to the patriotic conduct of Lieutenant Jones.

But let us see, Sir, whether the Commodore does not inform us of something more than a mere invasion of Mexico—let us see whether according to his testimony, no portion of the territory of the United States, was to be taken from them and incorporated with the new Empire. In speaking of the consequences and effects of the erection of this Empire, Burr said, that " the navigation of the Mississippi and the commerce of New Orleans, might be immedi-

ately extended to every part of the world, with very great advantage." But how was this effect to be wrought, by his establishing a government in *Mexico?*—Compare this remark with the plan disclosed by Burr to Eaton, and Blennerhassett to the Hendersons—" He was to erect a seperate Empire in the West, *of which New Orleans was to be the capitol*, himself the chief." Is it not obvious, Sir, that in this remark to the Commodore, about extending the navigation of the Mississippi, and the commerce of Orleans, he had his mind's eye upon the project developed to Eaton; that in imagination, he was already 'throned in Orleans, surrounded with imperial glory, and, under the auspices of Admiral Truxton, was pushing his commerce and his conquests into every quarter of the globe, and disputing with the modern Charlemagne, the dominion of this planet?

But these schemes, of which Commodore Truxton, gives us but a twilight glimpse, are shewn us in broad day by the evidence of General Eaton. This gentleman at first, gave into Burr's plans, because he believed them honorable, and under the sanction of government. But this artful man, dwelling on the supposed wrongs which General Eaton was suffering from the government, and the reflections which had been thrown out against him on the floor of Congress, in a strain of generous and indignant sympathy, until he believed that General Eaton was inflamed to the point of resentment and revenge, to which he wished to bring him—be-

gan to diverge from the legal ground and speak more openly. General Eaton beginning to see that all was not right, now affected, through policy, that resignation which he had at first sincerely felt: his object was to discover the whole extent of the project. Colonel Burr now came out. " He laid open to me says General Eaton, a project of revolutionizing the territory west of the Alleghany—establishing an independent government or empire there—New Orleans to be the capital—himself the chief"—He proceeded to state, that with this view, " he had in person, the preceding season, made a tour through that country: that he had secured to his interest, and attached to his person, the most distinguished persons in Tennessee, Kentucky, and New Orleans—that he had inexhaustible resources—that the army of the United States would act with him—that it would be reinforced by eight or ten thousand men from the above named states and territory"—Of General Wilkinson he said, that he was to command his army, " and from the tenor of much coversation," says the witness, " I was prevailed on to believe, that the plan had been concerted with General Wilkinson, and would have his co-operation. He stated among other things, that a certain E. Kibby, late a ranger in General Wayne's army, and who lived somewhere in the neighbourhood of Cincinnati, was embarked in this enterprize, and that the militia of his county, were ready to march at his, Burr's, signal. Burr talked of this revolution,

says General Eaton, as a matter of right, inherent in the people, and constitution."—Behold here the argument of the Querist: and the argument of Colonel Burr, at the house of Mr. Morgan. Burr proceeded to state to Eaton, that " the revolution which he meditated, was one, which must inevitably take place, and for which, the present moment, was peculiarly favorable, for that there was no energy in the general government to be dreaded."—This was in the winter of 1805-6—and here we have a project, distinctly announced, of a seperation of the United States, by the boundary of the Alleghany, and that seperation, too, to be effected by a military force—a military force which was already prepared and ready to move on the first signal from Aaron Burr. Compare this narration with that of the Hendersons, and with Burr's own conversations with Truxton and the Morgans, and I believe you will agree with me, Sir, that there is not upon earth, an unprejudiced man, who is so impenetrable by evidence, as to doubt General Eaton's statements; and to believe them, is at once, to believe Aaron Burr a traitor. But let us proceed with the evidence which General Eaton gave in upon his last examination. " Mr. Burr enquired of me, with what officers of the marine corps, I was acquainted—and observed, that if he could gain the marine corps, and secure to his interests the naval commanders, Truxton, Preble, and Decatur, he would turn Congress neck and heels out of doors, assas-

" sinate the President, or some expression to " that effect, " hang him" " throw him into the " Potomac," " send him to Carter's Mountain." Burr proposed to Eaton, to gain those naval commanders: but as he declined that honorable office, we find Burr himself in the following summer, attempting their seduction. We have had two of those gentleman before us; and we find that Burr, in calculating that their sense of moral duty, was as callous and dead as his own, reckoned without his host. They repelled him with the spirit and dignity, which became them. It was in July, that he had his conversation with Truxton: and then it was, that he told him he was about to dispatch two couriers to Wilkinson with letters. Those two couriers were Bollman and Swartwout, and the letters, which they carried, were those in cypher. In August, we find him at Colonel Morgan's. He had then bade adieu to New-York, and, as he says, in his cyphered letter, " never to return." His conversation and his conduct at Colonel Morgan's, was such, as to demonstrate that peace and agriculture, were not his objects. War and the severance of the Union, were the predominant topics of his conversation. He had in his company, Colonel Dupeistre, fresh from the school of French tactics, and he represented him to the young Morgan's, as being one of the first military characters of the age.—At dinner, he insisted on the severance of the Union by the Alleghany—said it would certainly take place—he seemed laboring to prepare the

minds of his hearers for that event, and to reconcile them to it. He pressed as he had done with Eaton, the right of those people, to a seperate government—a right inherent in them, and guaranteed by the constitution. He complained, as if the country were already his own, of the drains of its wealth, by the sale of the western lands, and of the tribute which it paid in the shape of taxes, to the eastern states.—From this subject, the transition was easy and natural to the federal government—he spoke of its wretched imbecility—" so weak is it," said he, " that with two hundred men, I can drive Congress into Potowmac, and the President at the head of them, and with five hundred men, I can take New-York." He appealed to Dupeistre if it could not be done; and he, the first military character of the age, bowed assent.—Here you have again, the very language which he used to General Eaton. After dinner, he walked from the dining room, into the passage —beckoned to him, Mr. Thomas Morgan, and when alone together at the back-door, he asked him, what his pursuits were—He was studying law—" surely, said Burr, you can't find employment here, either for mind or body, and *I suspect that in Pittsburg, there are many other young men in the same situation. Under our government*," he continued, " there is no encouragement for talents—John Randolph has declared on the floor of Congress, that men of talents are dangerous:" this by the way, I

suspect, was rather a poetic licence. Mr. Burr, however, feeling his pulse, in order to ascertain whether he was one of those who aspired to something beyond the dull pursuits of civil life, asked him, how he would like a military enterprize?—That will depend, said Mr. Morgan, on the object. I wish, replied Burr, " I wish you were on your way with me." This was a frank confession, that he himself, was on a military enterprize: it was something more: it was an acknowledgment, that he contemplated a different form of government—a government of more energy, and one which should hold out encouragement to men of talents. Let it be remembered, that at this time, there was no war declared against Spain. Let it be remembered, too, that previous to this time, he had written his cyphered letter, in which he says, " *the enterprize is actually begun—the eastern detachments are in motion.*"—In the evening's walk, he was perpetually enquiring of General Morgan, as to the military turn of his brothers, and on seeing his brother George, exclaimed with great vivacity and emphasis, " he is a fine fellow!—How I should like to see him at the head of a corps of grenadiers!"—Combining the strain of these continued conversations, with the direct proposal to Mr. Thomas Morgan, it does not appear to me, to have required all that sagacity, which Mr. Wickham supposes, to discern that mischief was on foot, and to foresee, that Burr would very probably, propose to the old gentleman, to give him one of his sons, or, if he could,

decoy away the son, without such proposal. It was better, however, to get the father's consent, because by this means, the son, instead of making a rapid, stolen march, would have leisure and opportunity to try whether *those other young men*, who were vegitating in Pittsburg, *without employment for mind or body*, would not join the banners of the cross, and throw themselves headlong into this holy war against their country! As if Aaron Burr had any right to calculate, that a band of generous young men, warm from the contemplation of Grecian and Roman patriotism, and whose bosoms were even yet bounding with rapture over the picture of Brutus, rising "refulgent from the stroke of Cæsar's fate," could so easily forget the sublime beauty of virtue, and become the vassal followers, the dirty tools of an American Cæsar! Yet this is the calculation which he did make: and we find him vain enough to believe himself so irresistible, as that he could seduce the venerable, patriarchal head of this virtuous family, to consent to the dishonor of his son. It is astonishing to me, Sir, with what boldness, this man urged on his project. He really seems to have proceeded upon the supposition, that the distinction between vice and virtue, was lost upon the earth, and that men had no other motives of action, than whim, pleasure and interest. His attack upon that respectable old gentleman, Colonel Morgan, has been very ingeniously made a subject of ridicule, by one of his counsel. It was as good a way of getting over the incident, as he

could have adopted. The truth is, that it had every badge of guilt upon the face of it. Burr, Dupeistre, and the family generally, had retired to bed. Colonel Morgan and his lady, alone sat up, and as was usual, she was reading to him. " About 11 o'clock at night, says Colonel Morgan, and after I supposed he had been asleep an hour, Colonel Burr came down. Mrs. Morgan retired. Burr took out of his pocket a book, and after looking in it a little while, asked me if I knew a Mr. Vigo, of Fort St. Vincennes? I answered that I did—I had good reason to know him—I had apprehended him in 1786, to be deeply concerned in the English conspiracy, (I called it a *nefarious scheme*,) to seperate the states—I took care on purpose, to lay an emphasis on the word nefarious, and repeated it emphatically. Colonel Burr closed his book, and went up stairs. I believe, added the witness, that I was very well understood by Colonel Burr. Next morning, Colonel Burr and Dupeister, went off calier than was expected—they went before breakfast." Now, Sir, to what purpose, this midnight visit—why the enquiry about Vigo, a notorious incendiary, and agent in 1788, to effect a seperation of the states—and why Burr's abrupt and sudden retreat, upon Colonel Morgan's calling that scheme *a nefarious one?*—It was because that scheme was also his—and because he found it held in such rooted abhorrence and detestation, as to despair of carrying the point, which had brought him down stairs. I defy gentlemen to give any

other rational solution of this most extraordinary movement. Compare his conduct and conversations at Colonel Morgan's, with the testimony of General Eaton, and you will find it impossible to doubt, that his determination to sever the Union, was in full force in August 1806. Let us follow him to Blennerhassett's island, where he arrived about the last of August, or the first of September. Here his sorcery was more successful, than it had been at Morganza. Never was there infatuation more extraordinary. What his disclosures to Blennerhassett were, we learn from the publication in the Marietta Gazette, under the signature of the Querist, and from Blennerhassett's communications to the Hendersons. In the Querist, we find precisely the arguments and inducements for a seperation of the Union by the Alleghany, which had been urged by Burr to Eaton, and the Morgans. So perfect is the co-incidence, that it will be impossible for any man who compares their evidence with the publication, to avoid the conclusion, that the ideas of the Querist, were suggested by Colonel Burr, although the work was written by Blennerhassett. Such also was the conclusion of the witness, Doctor Wallace, on reading these essays, and remembering the conversation which he had with Burr, during his excursion in 1805. The conclusion is rendered the stronger, by the consideration formerly mentioned, that the first number of that work, must have been written, while Burr was on the island. But gentlemen

have founded on the Querist, an argument, on which they seem to rely very sanguinely—they contend, that if a seperation of the Western States, was meditated, this publication proves that it was intended to have been brought about by reason and argument—by the operation of moral causes, and not by that force, which would make it treason: Why then in the first number of this work, whose sole object is to justify the severance of the Union, is there a menace of an explosion, which was shortly to resound from the gulf of Mexico, to the head waters of the Ohio. It will scarcely be believed, that this explosion was to be that of a moral cause. But we are not driven to inference on this subject. Look at the evidence of the Messrs. Hendersons. What were the moral causes suggested by Mr. Blennerhassett, as the instruments of this seperation. 1. The auspices of Colonel Burr: *Teucro duce.* 2. The park of artillery at New-Orleans. 3. Ten thousand soldiers on the western waters. 4. The plunder of the bank and military stores at New-Orleans, and the seizure of the shipping, and lastly the violent obstruction of the Mississippi, by locking up the mouth of it. These are the moral causes by which the western country, was to be *constrained* to come *voluntarily* into the measure, and submit their necks to the yoke of the Usurper; and the moral causes by which the dominion so acquired, was to be maintained, were artillery and sharp shooters in the passes of the mountains. This is the morality and argu-

ment of Emperors; the *ultima ratio regum*.—These prominent objects, "that a seperation of the union was contemplated," "that New-Orleans was to be *seized*," "the bank of New-Orleans *seized;* all the military stores—a park of artillery, (he thinks of 50 pieces) to be *seized*, and that country revolutionized in the course of nine months, and a more energetic government established—that the country west of the Alleghany could not remain neutral, but if they opposed, would be constrained into the measure," these objects are distinctly annouced, by Blennerhassett, as those of the enterprize.—Adopting precisely, the language of Burr to Truxton, he proceeded to state, "that the principal characters throughout the Union, were concerned in it—that the officers of the navy and army were secured, and among others, mentioned General Eaton, as being engaged." I will not stop, Sir, to note the identity of this confidential meadow talk of Blennerhassett, with the various communications of Burr to Eaton, Truxton, and the Morgans. You perceive the plan is identically the same. Nor is it, scarcely necessary to remark, that after the numerous subjects, which Blennerhassett had learnt from Burr, and stated to the Hendersons, as being intended to be *seized* at Orleans.—Swartwout, also the instructed agent of Burr, might well say to Wilkinson, that there was to be *some seizing* there. This seizing, however, is a moral cause in Aaron Burr's new school of ethics.

Thus, Sir, we have traced this project, from the winter of 1805, down into the month of September 1806, and we find it treason throughout. In the following months, while his transports were building at Marietta, we find him traversing the states of Kentucky and Tennessee, in every direction, with an assiduity, and under a cloud of mystery, which filled every patriotic bosom with concern: while, there is reason to believe, that he derived a species of enjoyment from the conjecture, confusion, and dismay, which he was spreading through the country—from the pangs which he was giving to honest hearts! Gracious God! Are these the proofs of this man's boasted magnanimity, and greatness of character! Measure him by the side of a Cato, or a Washington! Into what littleness and insignificance, does he sink! It was during this season, that putting on a bold face, where he knew there was no danger, he flew twice or thrice to meet a prosecution, while he was aware, that the prosecution was not ready to meet him. He well knew where Eaton, Truxton, Stoddard, Decatur and Wilkinson, were—he knew that the members of the evidence necessary to his conviction, were scattered over the continent, at such distances, as to render it perfectly impossible for them to be assembled, in support of those prosecutions.—Yet these mock trials, without evidence—these *acquittals*, as they are called, were matter of as much triumph and festivity, to Aaron Burr and his friends in the West, as if they had been the

triumphs of truth, on a full and fair hearing—even now, he pays such a compliment to your understanding, as to expect that you will regard them as proofs of his innocence.

In December we have him, true to his appointment, attending the rendezvous of his men at the mouth of Cumberland: What passed there, has been already noticed; under another head of this argument, as has his midnight passage, by Fort Massac. As he descends the river, his recruiting officers are circulated through the country, on each side of it. What the terms of enlistment were, we learn from Thomas Hartley, among others, who was one of those officers. The recruits, of whom he made two in the neighborhood of New Madrid, were to drop down the river, to be delivered to Aaron Burr—place themselves under his command, and *go to New-Orleans, on a service for six months*—for this, they were to receive *twelve and an half dollars per month, and one hundred acres of land.* The nature of this engagement, and the theatre of the intended service, speak for themselves. I will not detain you, Sir, for the purpose of collecting the various incidents which occurred, during the voyage down the Mississippi, and shewing how they conspire to establish the charge of a treasonable object. Let us pass on to the time when the suspicion of Burr's designs had gathered to such a head, as to produce an examination of his boats. His enterprize was believed to be of a

military and criminal nature—it was believed, that upon a search, evidence would be discovered to justify or to remove that suspicion—Burr consented to the search—but how did he meet it? With the front of candour and conscious innocence? No, Sir—he had recourse to a trick to which the spirit of a man, bold in his own honesty, would have scorned to stoop.—The arms are concealed, Sir: the arms, which he knew were the object of the search, are effectually hidden: and then a search is *boldly* invited and defied. I feel no pleasure, Sir, in resting on this circumstance. Where was that distinguished firmness and elevation of character, which have been hitherto ascribed to Colonel Burr, when he could descend to an artifice like this! What but the thorough conviction, that a fair search would end fatally to him, could have induced a man of his acknowledged courage, to humble himself by so pitiful and dastardly a shift? Let us pass on from this scene, so degrading to human nature. The circumstance next to be considered, is his interview with Mr. Poindexter—and I propose simply to remark on one sentence in his communication to that gentleman. "As to any projects or plans, which may have been formed between General Wilkinson and myself heretofore, they are now completely frustrated by the *perfidious* conduct of Wilkinson:"—General Wilkinson we learn, had just blown the schemes of Burr at New-Orleans, by promulging the cyphered letter. I consider Burr in the sentence just quoted,

as acknowledging the truth of Wilkinson's statement: Perfidy implies, that a man has trusted and been betrayed: in the breath therefore, in which he accused Wilkinson of perfidy, he confessed, that he had trusted him, and admitted thereby, the cyphered letter to be his. It was on this occasion, that Mr. Burr, assuming the character of a sovereign and independent Prince, entered into a formal capitulation, as to the terms on which he would surrender himself to the laws of his country: an act by which, he at once declared, that he was in a state of seperation and war with his country: that in the limits of her territory, he held a distinct and independent sovereignty, in opposition to her laws, to which he was superior and unamenable, unless *he should choose* to submit to them.

Much has been said, about the peaceable and orderly deportment of these men—that no violence against the United States, was intended in any event. In reply to this, I beg leave to recall to your recollection, the evidence of Mr. Poindexter. "A boat," says that gentleman, "commanded by Lieutenant Paterson, of the militia, with between twenty and thirty armed men, landed about two hundred yards below, on the west side of the Mississippi, for the purpose of ambuscading the men of Burr's party, who were seperated from their boats, and were amusing themselves in the woods. A person, whom I did not know at that time, but whom I have since found to be Davis Floyd, approached Colonel Burr, and asked him, what was to

be done; saying, that a boat had landed a short distance below, on the same side of the river; *that he was not afraid to attack the boat, provided such were his directions.*" I cite this circumstance, to shew the temper of the men, of whom Floyd, was one of the leaders, and their military subordination to Colonel Burr, although his orders should be to attack the militia of his country. To shew the temper of Burr himself upon this subject, I beg leave to refer you to the note proved to be in his hand writing, which was found in the cape of the coat of a negro boy, who was apprehended on his way from the town of Washington, in the Mississippi Territory, (where Colonel Burr was) to the boats of Burr, lying on the river—that note, is in these words—" If you are yet together, keep together, and I will join you tomorrow night. *In the mean time, put all your arms in perfect order.* Ask the bearer no questions, but tell him all you may think I wish to know. He does not know that this is from me, nor where I am." Directed to " C. T. and D. F." The address, is explained to mean, Comfort Tylor, and Davis Floyd—the two head men of the flotilla.

From this view of the evidence, concise and imperfect as it has been, it seems to me, impossible to doubt, that the objects of these men at the mouth of Cumberland, were,

First. To *seize* New-Orleans, with its bank, shipping and military stores: not merely to use it for the purpose of preparation against Spain;

but to hold it permanently as the metropolis of the New Empire: and,

Secondly. By locking up the Mississippi, against the exports of the Western country, or by any other auxiliary means, which might have been found necessary, to constrain that country within the pale of the Empire, and thus effect "a seperation of the Union, by the Alleghany"—(a form of expression, which I beg leave to retain, notwithstanding Mr. Martin's criticism on it, as used by the President, and without which, it seems to me, the gentleman might have *sot** himself down contented.)

Thirdly. After seating himself firmly in his new Empire, and making himself master of the Mexican fleece, to pass over to the East of the Alleghany, and remind us of the Vice-Presidential election of 1805—to plant his standard at the seat of our government—drive Congress into the Potomac, with the President at the head of them—and endeavor to balance, in extent and grandeur, the Empire of the East. Or if his brain had not been so long brooding over the real and living romance of Europe, as to have conceived this project in its whole extent—if it was only meditated to seize the City of Orleans, with its wealth, and hold it in opposition to the

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* *Mr. Martin's mode of pronouncing the word, which is commonly called* sat; *thus we would say,* "*after the Court had sat or sitten.*"—*Mr. Martin had very frequently occasion to say,* "*after the Court had* sot."

laws of the United States, it has already been shewn, that this intention was treason, and would therefore justify the commitment, for which we move.

But here we are met by a serious legal objection: "for admitting," the gentlemen say, "that Burr, Blennerhassett and Smith, had, all of them treasonable views, and that the meeting at the mouth of Cumberland, was one, in a warlike posture, still it was not levying war: because, the men who were there assembled, were ignorant of any treasonable design:"

To this I answer, 1. That the degree of knowlege or ignorance, which these men possessed, either at Cumberland, or any where else down the river, is, *of necessity*, learned, only by their own examination: they were answering in a case, in which their own characters were at stake: and in opposition to any professsons of patriotism on their part, we have the strong proof of their practical devotion to their leader, of the military terms of their engagement; of the ease with which Davis Floyd, believed he could lead them to the attack of the militia, and of the conviction of Burr, as expressed in his secret note, that they would wield *all their arms* in his cause.

2. Admitting the men to have been ignorant of any treasonable design, and that this might exculpate *themselves*, does their ignorance, purge away the guilt of those who had such treasonable designs?

3. It is not law, that the ignorance of the

men, as to the precise objects of Aaron Burr, would exculpate *them* from the charge of treason, much less, that it would exculpate *their leaders:* on the contrary, the guilt of the leaders, would impart itself to the men. Such was the case of the Earl of Southampton and the other friends and followers of the Earl of Essex, 1. St. Tr. 206. Mr. Martin, in referring to this case, has said, that it never was pretended by the Earl of Southampton, that he was ignorant of Essex's treasonable designs: This is a mistake. In the page just referred to, the Earl of Southampton, most explicitly avows his ignorance: and the truth is, that the whole case proceeds upon the admission, that Southampton and the other followers, were ignorant of Essex's designs. So the case has always been considered, by every subsequent writer: Thus 1. Hale's P. C. 138—speaking of the resolutions of the court, on that case, he says: "3. That the adherence of the Earl of Southampton, to the Earl of Essex, *though he did not know of any other purpose than a private quarrel, which the Earl of Essex had against certain servants of the Queen*, was treason in him, *because it was a rebellion in the Earl of Essex.* 4. That all they, that went with the Earl of Essex, from Essex House, to London, *whether they knew his intent or not, were traitors*, &c." To the same effect precisely, is Kelyng, 77. The ignorance of the followers, then, according to this authority, is so far from operating as an excuse for their leaders, that it will not even excuse themselves. On the con-

trary, they are implicated in the treason of their leaders.

But it has been said, that this is a case of compassing the Queen's death, and that the principle will not apply to the treason of levying war. Admitting what is very questionable, (see 1. Hale's P. C. 138-9) that this was a case *purely* of compassing the Queen's death, what reason is there to confine the resolutions of the court just read, to that particular species of treason? In the treason of compassing, the guilt has been all along said to consist in the intention: in the case just cited, however, the men not only, had not the intention, but were ignorant even that Essex had it: They were perfectly innocent then, of that which makes the only guilt of the treason: yet they fell under the guilt of their leader: they were the victims of imputed sin: *they had devoted themselves to a leader without knowing his purposes, and thereby adopted his purposes whatever they might be.* Ignorant as they were, of any rebellious purposes, it was still *rebellion* in them: Why? Expressly, "because it was *rebellion* in the Earl of Essex." Such was the case of the men themselves. But the Earl of Essex, was never so preposterous, as to rest *his* defence on the ignorance and innocence of *his followers*. He knew that he must rise or fall by his own guilt or innocence. In the case then, of the followers of that Earl, it was *the intention*, which was supplied by imputation—an intention which it was admitted, they had not in reality, and which

constitutes the sole guilt of the charge. What hardship then could exist in imputing intention in the case at bar, which did not exist in that case? What reason could there be, for supplying the intention in Southampton's case, which does not apply with equal force to the case at bar. Was it following an acknowledged leader and chief, without knowing his purposes, which was considered in that case, as an adoption of his purposes? In this case then, his men also followed an acknowledged chief and leader, without knowing his purposes, and therefore, the same legal effect, should result. Will it be said, that in this case, the men have declared, that they had no intention to strike at the peace of their country, and did not know that Aaron Burr had any such intention? So in that case, the men declared, that they had no intention to endanger the life of the Queen, and knew not that the Earl of Essex had any such intention. Does the court believe these men to have been really innocent of any such intention: there, in like manner, the court expressly admitted their innocence. The cases then, are in circumstances, so strikingly parallel, that if the followers of Aaron Burr, were themselves upon their trial, I do not perceive, how upon legal ground, they could escape the fate of the followers of Essex. But the enquiry now is, as to the guilt of Burr, and the other chiefs; and we ask only, that *they* may be tested by the guilt of *their own purposes.*

Thus, Sir, I have endeavored to shew, 1st. That the meeting at the mouth of Cumberland, was in a warlike posture, i. e. in a condition to attempt or proceed upon their purpose: 2. That the purpose was a treasonable one; being at least, to seize and hold the City of New-Orleans, against the authority of the United States.—If I have succeeded in maintaining these two propositions, then the accused were guilty of levying war at the mouth of Cumberland, in Kentucky, and will be committed for trial in that State.

But if I have failed on this ground, still the motion for commitment, on the misdemeanor, remains. I consider this question, as having been already decided. In addition to the evidence already relied on, the cyphered letter, is before the court. The authenticity of that letter, does not rest on the evidence of General Wilkinson only. We have seen Burr, announcing, in July 1806, to Commodore Truxton, two couriers whom he was about to dispatch to Wilkinson with letters. The cyphered letter, bears date the 29th July. The two couriers, Bollman and Swartwout, carried duplicates of this letter to Wilkinson. Burr acknowledged the letter to Dunbaugh, when he complained of Wilkinson's having ruined him, by the disclosure of it: and he acknowledged it to Mr. Poindexter, when he complained of the General's *perfidy*. I will advert here, only to one part of this cyphered letter—" Already are orders to the contractor given, to forward *six*

months provisions, to points Wilkinson may name:" here we have the key to the *six months engagement* of the men, who descended the river with him. I now proceed to shew, that this letter, of itself, has been already decided, to prove the misdemeanor, beyond question. It will be remembered, that General Wilkinson's affidavit, which was before the Supreme Court, in the case of Bollman and Swartwout, contained little or nothing in relation to an invasion of the Spanish provinces, except the cyphered letter. In that case, the supreme court said, "That both the prisoners were engaged in *a most culpable enterprize against the dominions of a power at peace with the United States*, those who admit the affidavit of General Wilkinson, *cannot doubt*. But that no part of this crime, was committed in the district of Columbia, is apparent. It is therefore, the unanimous opinion of the court, that they cannot be tried in this district." Again, Sir, on the motion to commit Aaron Burr, in March, you said, "The enterprize described in this letter, is obviously *a military enterprize*, and *must* have been intended, either against the United States, or *against the territories of some other power on the continent, with all of whom, the United States were at peace.*

"The expressions of this letter, must be admitted, to furnish at least, probable cause for believing, that the means for the expedition were provided. In every part of it, we find declarations, indicating, that he was providing

the means for the expedition, and as these means might be provided in secret, I do not think, that further testimony ought to be required, to satisfy me, that there is probable cause for committing the prisoner on this charge."—You accordingly committed him. But the great fact of the means being provided, which was then matter of presumption, has now become matter of certainty, by the proof of those means, which has been laid before you: And it is not to be believed, that the court, will now refuse to do upon the certainty, what they before did, upon the presumption.

After all that has transpired upon the subject, Sir, I did not expect to hear so bold an assertion, as that which one of the counsel for the prisoners, threw into the close of his harangue —" that the government has expended 100,000 dollars, for the purpose of proving the innocence of the man, whom they were persecuting, and the guilt of the creature, who was their principal engine in the business."—Such was the substance of his remark.—The expenses of this prosecution, are certainly heavy enough, without this enormous exaggeration. There were no alternatives, however, before the government, but to incur them, or to permit this offender, to escape with impunity, and renew his machinations against the peace and liberties of his country. " But he is an innocent man." Is he so? Sir, if the body of evidence, which fixes the guilt of this man, were not before the public—if they had no other fact than

the finding of their grand jury, they would not very readily believe this assertion of an advocate. That grand jury, have, upon their oaths, declared, that he was guilty of treason. And who were the grand jury? Were they the creatures of the government? Look at them, Sir: Look at their foreman. How often on the floor of Congress, has he signalized his independence! Call over the grand jury, one by one, and ask their characters. You will find them equally independent. *They*, *too*, *Sir*, *heard all the evidence*. Nor were they without professional aid to instruct them what was evidence. Two of their body, were among the most illumined, and eminent counsel in Virginia; and in their political, as well as moral principles, as independent as they were illumined. One of those gentlemen, indeed, concurs with the administration, in political sentiment; but he has a spirit far too philosophic, dignified and elevated, to be the tool of any man or any set of men: the other, is of politicts diametrically opposed to the administration: He is a federalist; but of that ardent, liberal, and noble cast of soul, which makes him equally a favorite with all parties. There were other federalists upon that jury: but they were all men of property, and of unblemished character. Yet among these gentlemen of conflicting politics, there was no discord on the subject of their enquiry. So clear, so full, so irresistible was the evidence, that as to Burr, and those his confederates, they had but one voice—" they were traitors to their coun-

try." Poised against the finding of a body like this, upon a full and calm examination of the whole case, what weight is there in the assertion of the criminal's counsel, or even in the verdict of a petty jury, *deciding without evidence.* No, Sir: after *such a finding* by *such men*, the people of the United States, will never believe that this was an unfounded prosecution.

Sir, there are circumstances in relation to some of the accused, calculated to affect us with a sentiment, which they, perhaps, would disdain —I mean pity. But if these men are discontented with that equality, which is the basis of a republic; if they are so resolutely bent on their own aggrandizement, as to be willing in promotion of it, to shake this country, under the convulsions of civil war, and deluge it with blood—instead of wasting our sympathies upon them, let us feel for ourselves, our wives and our children.—Let us feel for our liberty—that precious deposit of our fathers, without which —our fields would smile no more; but light and life themselves, cease to be blessings.

I have done, Sir: I have endeavored to discharge the duty which I had undertaken. I have meant no more.

THE END.

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